85-1203

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDUCATIONAL SERVICES, INC.,
A Maryland Corporation doing business as
International Montessori Society;
LEE HAVIS,

Petitioners,

v.

MARYLAND STATE BOARD FOR
HIGHER EDUCATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court improperly denied relief to Petitioners under Title 42 U.S.C. § 1983 for deprivation of their rights under the First and Fourteenth Amendments of the United States Constitution in state action prohibiting and otherwise restricting the operation of Petitioners' private schools.

2. Whether the Court improperly refused to rule on the issue of violation of the Establishment Clause of the First Amendment in this case.

3. Whether or not the Court improperly dismissed the complaint in this case by summary judgment under Rule 56, F.R. Civ. P.

4. Whether or not the district court judge failed to conduct a genuine *de novo* determination of the Magistrate's Report and Recommendation as required by Rule 72(b), F.R. Civ. P.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE COURT APPLIED IMPROPER DUE PROCESS STANDARDS IN UPHOLDING THE DENIAL OF LIBERTY TO OPERATE PRIVATE EDUCATION 7

II. MD. EDUC. CODE ANN. §§ 2-206 AND 12-201 *et seq.* ARE UNCONSTITUTIONAL ON THEIR FACE 13

III. THE ISSUE OF VIOLATION OF THE ESTABLISHMENT CLAUSE WAS IMPROPERLY AVOIDED 17

IV. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED UNDER RULE 56, F.R. CIV. P 23

V. A GENUINE *DE NOVO* DETERMINATION WAS NOT CONDUCTED AS REQUIRED BY RULE 72(b), F.R. CIV. P 28

CONCLUSION 29

CERTIFICATE OF SERVICE 29

APPENDIX A 1a

APPENDIX B 1b

APPENDIX C 1c

APPENDIX D 1d

APPENDIX E 1e

APPENDIX F 1f

APPENDIX G 1g

TABLE OF AUTHORITIES

Page

Cases:

Abingdon School District v. Schemmp,
374 U.S. 203 (1962)..... 8

American Montessori Society, Inc. v. Association Montessori Internationale,
155 U.S.P.Q. 591 (1967).....12

Board of Education of Central School District No. 1 v. Allen,
392 U.S. 236 (1968)..... 9

Board of Education v. Pico,
457 U.S. 853 (1982).....24

Educational Services, Inc. et al. v. Maryland State Board for Higher Education, et al.,
710 F2d 170 (4th Cir., 1983).....6,20,24

Farrington v. Tokushige,
11 F2d 71 (9th Cir., 1926),
aff'd. 273 U.S. 284 (1927)..... 8

Forest Hills Early Learning Center, Inc. v. Lukhard,
728 F2d 230 (4th Cir., 1984).....19,21

Griswold v. Connecticut,
381 U.S. 479 (1965)..... 8

Highland Farms Dairy, Inc. et al. v. Agnew et al.,
300 U.S. 608 (1936).....16

Hunter v. Board of Education of Montgomery County,
292 Md. 481, 439 A2d 582 (1982).....12

Lemon v. Kurtzman,
403 U.S. 602 (1971).....21,22

Meyer v. Nebraska,
262 U.S. 390 (1923)..... 8

Milwaukee Montessori School v. Percy,
473 F Supp 1358 (1979).....19

Page

Moore v. City of East Cleveland,
431 U.S. 494 (1977).....9,10

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1970).....14

Panama Refining Co. et al. v. Ryan,
293 U.S. 388, 79 L. Ed. 446 (1934).....16

Pierce v. Society of Sisters,
268 U.S. 510 (1924)..... 8

Ratnayake v. Mack,
499 F2d 1207 (8th Cir., 1974).....26

Schneider v. Pullen,
198 Md. 64, 81 A2d 226 (1951).....15,16

Shelton v. Tucker,
364 U.S. 479 (1960).....16

Shuttlesworth v. Birmingham,
394 U.S. 147 (1969).....14

Sloan v. Lemon,
413 U.S. 825 (1972).....22

Southeastern Promotions Ltd. v. Conrad,
402 U.S. 546 (1974).....14

U.S. v. Diebold, Inc.,
82 S. Ct. 993, 369 U.S. 654,
9 L. Ed. 2d 176 (1961).....23,24

Wallace v. Jaffree,
_____U.S._____ (1985),
45 CCH S. Ct. Bull. P. B3251.....8,17

West Virginia State Bd. of Education v. Barnette,
319 U.S. 624 (1942).....12

Widmar v. Vincent,
454 U.S. 263 (1981).....11

Page

Constitution, Statutes and Rules:

First Amendment, United States Constitution.....8,10,11,13,14,15,16,17,21,24

Fourteenth Amendment, United States Constitution.....8,17,20

28 U.S.C. § 1254 (1)..... 1

28 U.S.C. § 1343 (3), (4)..... 1

42 U.S.C. § 1983.....1,2

Rule 12(b), Federal Rules of Civil Procedure..... 6

Rule 56, Federal Rules of Civil Procedure.....23,24,25,26,27

Rule 72(b), Federal Rules of Civil Procedure.....28,29

Annotated Code of Maryland, Education Title (1985)

2-206.....1,13,14,15,17,18,19,20,21,22,23

2-206(e).....4,14

2-206(e)(2).....13

2-206(e)(4).....5,17,18,20,21,22,23

12-201 *et seq*.....1,13,14,15

12-201(a)..... 3

12-203.....14

12-203(b).....13,24

12-203(c)(3)..... 15

12-203(d)(2)..... 15

13A.09.09.05(c)(2), Code of Maryland Regulations..... 5

Page

Other Authorities:

7 Moore's Federal Practice, 72.04(10-2), p.72-69.....28

Absorbent Mind, by Maria Montessori,
p. 131, Pub. by Dell Publ. Co., Inc.,
New York, 1967.....11

Education for a New World, by Maria Montessori,
p. 66-67, Kalakshetra Publ.,
Madras 41, India, 1974.....26

The Petitioners, LEE HAVIS and EDUCATIONAL SERVICES, INC., respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on or about September 30, 1985 and the Order of November 7, 1985 denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing *En Banc*.

OPINION BELOW

The Order of the United States Court of Appeals for the Fourth Circuit was filed on or about September 30, 1985 in an unpublished opinion. A copy of the Opinion is attached herewith as Appendix A. On or about November 7, 1985, the United States Court of Appeals for the Fourth Circuit additionally denied Petitioners' Motion for Rehearing and rejected Petitioners' Suggestion for a Rehearing *En Banc*. A copy of said Order of November 7, 1985 is attached herewith as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners respectfully suggest that Federal Statutes Title 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution are relevant. Jurisdiction in federal district court is invoked under Title 28 U.S.C. § 1343(3) and (4). In addition, several provisions of the Annotated Code of Maryland, Education Title, are directly involved in this case; i.e., Sections 2-206, 12-201 *et. seq*. A copy of said statutes, state law provisions and constitutional amendments are attached hereto in Appendix G.

STATEMENT OF THE CASE

On September 28, 1981, Petitioners filed a complaint in the federal district court of Maryland, with motion for preliminary injunction, seeking declaratory and injunctive relief and monetary damages under Title 42 U.S.C. § 1983, alleging denial of First and Fourteenth Amendment rights to due process and equal protection of the laws in the operation of their private schools in Maryland. The Petitioners (hereinafter "Havis")[1], claimed that the Defendants, the Maryland State Board for Higher Education, the State Board of Education and certain state officials (collectively the "Board")[2] violated Havis's constitutional rights in prohibiting the operation of his private Montessori teacher training school and in the imposition of oppressive and discriminatory restrictions on the operation of his tutoring school, Capital Tutoring.

Havis's complaint centered primarily on the Board's actions in prohibiting the lawful operation of his private teacher training

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[1]Petitioners are EDUCATIONAL SERVICES, INC., a tax-exempt non-profit Maryland corporation doing business as the International Montessori Society (IMS) and LEE HAVIS, individual owner of a private tutoring school named Capital Tutoring. Lee Havis, an attorney, is executive director of the International Montessori Society. Because of the identity of interests between Petitioners, they will be collectively referred to as "Havis"

[2]Specifically named are the Maryland State Board for Higher Education, seven (7) members of the Maryland State Board for Higher Education: Richard Kline; J. Harrison Ager; Lucy Keker; Thomas Maddux; Mary L. Nock; Louis Randall; Gertrude Crist, Commissioner of the Maryland State Board for Higher Education, Sheldon Knorr, Staff members of the Maryland State Board for Higher Education: Joseph Durham, Robert Rogers, Clarence Baseman, the Maryland State Board of Education, and Superintendent of Schools, David Hornbeck.

school.[3] After some one and a half years of fruitless effort by Havis to obtain the necessary Board certification through their administrative scheme of application and approval in this regard, the Board on July 2, 1981 finally affirmed as final their denial of such approval. Havis's private teacher training school was thereby effectively and finally prohibited from lawful operation in the state of Maryland. Having thus exhausted all administrative remedies, Havis sought redress and relief from the Federal district court in his law suit filed on September 28, 1981.

Havis's suit essentially contended that his private teacher training school was prohibited from operation by a government system

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[3]Havis's private school was to prepare individuals for Montessori teaching with children aged 2-6. A specific curriculum of lessons and assignments was created by Lee Havis to accomplish this purpose and was accordingly proposed for operation as a private postsecondary institution in Maryland. Even though no state funding of such private institution was involved or intended, Board approval of its operation was nonetheless required since Section 12-203(a), Annotated Code of Maryland, Education (1985), (MD. EDUC. CODE ANN.), Appendix G, p. 6g, provides that "an institution of postsecondary education may not commence or continue to operate, do business, or function without a certificate of approval from the State Board for Higher Education". Accordingly, in February, 1980, Havis submitted his application to the Board to obtain their certification pursuant to the administrative scheme of approval established in this regard. As part of such scheme, the Board sent Havis's curriculum to various persons for their review and recommendation as to approval. Havis was not consulted beforehand in the selection of these persons, nor was he advised of their identity prior to their review and recommendation. These curriculum reviewers, including three (3) persons associated with private organizations unaffiliated with Havis yet employing the term "Montessori" in their title, responded by not recommending approval of Havis's curriculum. Thereafter, the curriculum was sent for further review and recommendation to other persons selected by the Board. Such additional persons were specifically informed of the curriculum's prior disapproval, including the identity and positions of the previous reviewers and an indication of their disapproval in this regard. The majority of these new reviewers recommended that Havis's application not be approved by the Board.

of academic content censorship which involved at its core a standardless, subjective review of his curriculum; that such prohibitory censorship was based on prejudicial opinion and lack of popularity among his competitors in the field of education. Havis also contended that whatever alleged "deficiencies" found by the Board in the curriculum were based on prejudice, and in any case, were essentially insubstantial, inaccurate or purely speculative subjective opinion. Since the prohibitory Board action was a prior restraint on Havis's private educational expression based on a standardless content censorship, Havis therefore asserted denial of his First Amendment freedom of expression and communication without due process of law.[4]

In his suit, Havis also sought, in his individual capacity, an injunction and declaratory judgment to operate his private tutoring school, Capital Tutoring. Although the necessary initial certification for such operation had been obtained under MD. EDUC. CODE ANN. § 2-206(e) (Appendix G, p.4g), Havis claimed that the Board's restrictions and requirements pursuant to such certification were so oppressive, unreasonable and discriminatory that

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[4]Havis's IMS curriculum represented itself as an expression and communication of a complete commitment to certain specified fundamental principles of nature. Such curriculum therefore consisted of a highly subjective content wherein the student's inner spiritual preparation was foremost. Validity of such commitment as a complete and effective basis for Montessori teaching was premised essentially on Havis's own conviction of conscience and his own personal experience of training Montessori teachers in Maryland since about 1977. Before serving as executive director of his present International Montessori Society, Lee Havis served as administrator and instructor for another Montessori teacher training school not owned or controlled by Havis and entirely separate from IMS. The curriculum of this prior training school had been written by Lee Havis and was referenced by one of the current curriculum reviewers as being virtually "identical" to the one at issue here. The prior curriculum had been approved by the Board for operation in Maryland in 1977 and held such approved operational status on July 2, 1981 when the Board disapproved the current Havis curriculum.

effective operation was impossible.[5] Accordingly, Havis has not been actively engaged in advertising for students and employing teachers even though the technical "certificate of approval" is presently valid in this regard.

Havis particularly challenged the restrictive impositions placed on his private school operation with reference to their violation of the Establishment Clause of the First Amendment since religious private schools are specifically and categorically exempted from similar burdensome restrictions by virtue of MD. EDUC. CODE ANN. § 2-206(e)(4).[6]

On November 9, 1981, the Board filed a motion to dismiss on various grounds. On November 24, 1981, the district court heard

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[5]Havis's tutoring school proposed to conduct individualized instruction in the child's home. Accordingly, such operation necessarily entailed the hiring of many different teachers with particular skills and abilities to match the specific needs of various diverse situations and locations. The restrictive requirements imposed on Havis in order to maintain a valid certification to operate Capital Tutoring were alleged to involve a burdensome and time-consuming prior approval and qualification of his teachers. Approval of individual teachers was required before they could be hired. Such approval generally entailed the completion and submittal of a lengthy, detailed application form, official verification of the possession of many specific academic courses and other such prior approval procedures and requirements which were alleged to effectively deter Havis's ability to operate his school as intended. In addition, teachers "in schools adhering to the Montessori philosophy" are required to have both an accredited bachelor's degree and "a Montessori diploma" from a state approved teacher training institution. (Code of Maryland Regulations, Section 13A.09.09.05(C)(2) (Appendix G, p.11g). Accordingly, such restrictions prevent Havis from using teachers trained in his proposed IMS teacher training school in his tutoring school and other regulated private Montessori schools.

[6]Section 2-206(e)(4) specifically exempts from regulation and certification "an institution operated by a bona fide church organization, including the Amish and Mennonite church parochial schools." (Appendix G, p. 5g). Were Havis to operate a religious tutoring school or Montessori school, he would be exempt from state oversight of his teachers' qualifications.

testimony and entertained argument on the Board's motion to dismiss and Havis's motion for preliminary injunction. In its ruling of January 6, 1982, the district court granted the Board's motion to dismiss on the basis of the abstention doctrine. *See* Appendix C.

On January 12, 1982, Havis noted an appeal and the United States Court of Appeals for the Fourth Circuit thereafter ruled in favor of exercising federal jurisdiction in the case, thus reversing the district court's dismissal and remanding the case accordingly for substantive proceedings as set forth in its published opinion: *Educational Services, Inc. et al. v. Maryland State Board for Higher Education, et al.*, 710 F2d 170 (CA4, 1983) (Appendix D).

On August 11, 1983, Havis filed a renewed motion for preliminary injunction and the Board filed a renewed and supplemented motion to dismiss on August 16, 1983. Thereafter, the case was reassigned and referred to a U.S. Magistrate for hearing with regard to such motions which was scheduled for November 9, 1984.

By letter dated October 10, 1984, the U.S. Magistrate notified the parties that pursuant to Fed. R. Civ. P. 12(b), the Board's pending motion to dismiss would be considered as a motion for summary judgment because of references made to matters outside the strict confines of the pleadings. On October 31, 1984, Havis filed a motion for partial summary judgment on behalf of an order granting declaratory and injunctive relief to enable his school operation in Maryland — reserving resolution of his damage claims for later proceedings in the district court.

On November 15, 1984, the U.S. Magistrate issued his report and recommendation on the pending motions (Appendix E), having concluded that an oral hearing was not necessary in this regard. Such report and recommendation was for denial of Havis's motions for preliminary injunction and partial summary judgment, and for entering summary judgment in favor of the Board, thus dismissing the complaint.

On November 26, 1984, Havis filed objections to the magistrate's report and recommendation to modify the magistrate's findings of fact and conclusions of law and accordingly to grant injunctive and declaratory relief pursuant to the complaint. By its order of December 18, 1984 (Appendix F), the district court declined favorable consideration of such objections and thereupon adopted *in toto* the magistrate's report and recommendation.

On January 2, 1985, Havis filed his notice of appeal to the United States Court of Appeals for the Fourth Circuit seeking reversal of the district court's summary dismissal of the complaint and its denial of injunctive and declaratory relief. On or about September 30, 1985, the United States Court of Appeals for the Fourth Circuit affirmed the district court's summary dismissal of Havis's complaint (Appendix A) and thereafter denied Havis's motion for Rehearing and rejected his suggestion for a Rehearing *En Banc.* (Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THE COURT APPLIED IMPROPER DUE PROCESS STANDARDS IN UPHOLDING THE DENIAL OF LIBERTY TO OPERATE PRIVATE EDUCATION.

The general question presented in this case is whether proper due process standards were applied by a state agency in its prohibition of certain private education. More specifically, the questions arise as to whether Havis's First Amendment rights to exercise freedom of speech and conscience in the operation of his

private schools were violated in the case-at-bar and whether censorship of certain private school curriculum based on prejudicial opinion and popularity is a constitutional exercise of state power.

The Fourteenth Amendment to the United States Constitution provides essentially that "No State shall...deprive any person of...liberty...without due process of law...". (Appendix G, p. 1g). It is well-established that such "liberty" includes the liberty to operate private schools. *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1924), and *Farrington v. Tokushige*, 11 F2d 71 (CA9, 1926), aff'd. 273 U.S. 284 (1927). More recently, this Court reaffirmed the constitutional liberty of private schools to operate with specific reference to the exercise of First Amendment freedoms in this regard. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("...the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes...freedom to teach.")[7]

Any state deprivation of liberty in private education, such as evident in the instant case, is only constitutionally permissible where there has been proper due process in such deprivation of liberty. In general, what is due process in this regard is not merely the

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[7]*See* also *Abingdon Sch. Dist. v. Schempp*, 374 U.S. 203, 242 (1962) (Justice Brennan concurring) (Justice Brennan noted that the First Amendment preserves a freedom of choice for the individual parent between a public secular education and private education. He stated that "In my judgment the First Amendment forbids the state to inhibit that freedom of choice...by restricting the liberty of private schools to inculcate whatever values they wish"); *Wallace v. Jaffree*, _____ U.S. _____ (1985) 45 CCH S. Ct. Bull. P. B3241 (decided June 4, 1985) ("...the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States...the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Id.* at B3262).

existence of certain superficial gestures by government officials and perfunctory formalities, but rather that which balances the liberty of the individual with the demands of organized society. *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977) ("Due process has not been reduced to any formula...it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.") Such a standard of due process was not applied in the case-at-bar.[8] Moreover, applying the proper standards in this regard in a fair scrutiny of the record here would reveal a total absence of any such due process. In brief, there is no discernible "demand of organized society" to have private schools, including that intended for operation by Havis, submit their curriculum to a standardless, subjective censorship by government officials who must thereby approve their content prior to operation under the guise of "regulation." Much less would such a system of academic content censorship be "demanded" when its practical effect is to prohibit a private school curriculum from expression based entirely on subjective, prejudicial opinion and unpopularity as evident in the present case. Any so-called "demands" of government to conduct such a prejudicial, subjective system of prior restraint of educational expression would

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[8]The Court's citation of *Board of Education of Central Sch. District No. 1 v. Allen*, 392 U.S. 236, 245-246 (1968) in this regard is misapplied on several grounds. Firstly, whatever constitutional state power of "reasonable" regulation over private education does not include the type of sweepingly tyrannical censorship involved in the instant case. Secondly, state power over private education referenced in *Allen* was clearly premised on the state's enforcement of legislation as to compulsory school attendance, an issue not involved here. In Maryland, the compulsory school age is 6-16. Havis's teacher training school is strictly for adults *over* the age of sixteen, directed to teaching children *under* the age of six years. Thirdly, reference to regulatory power over private education in *Allen* was in the nature of dicta wherein the issues before the Court were those concerning the two representative parties, both *public* education agencies. In brief, the rights and interests of private education were not squarely before the Court in *Allen*.

manifestly fail to outweigh the countervailing First Amendment liberties of the individual in private education which include the freedom to teach, to study, to express one's conscience and for parents to educate their children as they choose. The balance required for constitutional due process in the denial of such First Amendment liberties according to *Moore v. City of East Cleveland* would strongly rest with the exercise of such transcendent personal liberties since no tangible countervailing "demand" of society is evident by their prohibition in the instant case.

The U.S. Magistrate's due process rationale adopted by the court below failed to apply the balancing standard set forth in *Moore v. City of East Cleveland*. Notably, the significant First Amendment rights in private education being denied in this case were essentially overlooked or disregarded. The Magistrate's rationale thus amounts to a sweeping presumption and endorsement of tyrannical god-like state power to control, censor, restrict and otherwise arbitrarily and prejudicially prohibit all unpopular or unconventional private educational expression under the guise of "regulation."[9]

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[9]Although amply argued and substantiated in the record of the case, the prejudicial, arbitrary and subjective nature of the curriculum review afforded to Havis was essentially disregarded as apparently irrelevant to the judicial proceedings with respect to due process. The curriculum reviewers were somehow all deemed "qualified" even though the background and positions of some were clearly competitive with that of Havis in the field of Montessori education. Some reviewers were even specifically informed by government officials of the curriculum's prior disapproval, thus placing an obvious and blatent bias towards their similar disapproval of the curriculum. The so-called "deficiencies" alleged to exist in the curriculum were merely a compilation of unsubstantiated, vague and inaccurate conclusory assertions based entirely on prejudice and subjective speculation. No student or graduate of Havis's school was interviewed or consulted as to the value or effect of the curriculum because the school had not even opened its doors. The so-called "notice of deficiencies" sent to Havis was likewise so indefinite and subjective that no proper response or compliance was objectively possible, even assuming one's full intention to

(Continued)

In view of the First Amendment freedoms being denied in the present case, the proper standards for due process would accordingly require a strict judicial scrutiny as to the countervailing state interests interposed to justify such denial. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)[10]. Justification for abridgement of such First Amendment freedoms in private education as presented in this case is found in no readily discernible countervailing government interest. Certainly, there is no grave or imminent danger in the

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comply in every respect. Nevertheless, the Magistrate proceeded to assume or infer the existence of so-called "deficiencies", likewise assuming that all the curriculum reviewers were somehow "qualified" to engage in such a subjective process of review. The issue of prejudice among the curriculum reviewers was substantially disregarded, as was the fact that one of the "qualified" reviewers found the curriculum in question fully acceptable in all respects and accordingly recommended approval. Moreover, the vast differences of specific opinion among the various reviewers was not even called into question. Whatever "consensus of opinion" there may have been as to disapproval of the curriculum was found only in the naked conclusion itself in this regard—not as to the nature and substance of the so-called "deficiencies."

[10]The nature of Havis's Montessori teacher training school is plainly a matter of First Amendment expression to exercise a freedom of conscience comparable to one's free exercise of religion. Notably, Havis has described his curriculum and work of training Montessori teachers as a communication and expression of commitment to certain intangible fundamental principles of nature. Such training therefore necessarily entails a profound spiritual preparation within oneself. Dr. Maria Montessori, upon whose work Havis' teacher training school curriculum is assertedly based, stated that: "The real preparation for education is a study of oneself. The training of the teacher...is something far more than a learning of ideas...it is a preparation of the spirit." (Maria Montessori, *Absorbent Mind*, p.131, Pub. By Dell Publ. Co., Inc., New York, 1967). Havis asserts that his particular manner and means of training teachers to effectively apply Montessori principles with children is valid and genuinely committed to Dr. Montessori's discoveries and insights as to the nature and development of the child and its expressive being in the world. Such validity is essentially a matter of Havis's own inner conviction and personal discovery and is therefore not subject to its relative degree of appreciation, acceptance or popularity in society or among others in the field of education.

operation of private schools, such as that intended by Havis, which is merely unconventional or unpopular in the marketplace of ideas. There is no readily discernible demand of society for the forced standardization and unification of opinion and expression in all private education to thereby compel compliance with the dictates of popularity or prejudicial governmental edict. *West Virginia St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633-641 (1942) ("censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish...compulsory unification of opinion achieves only the unanimity of the graveyard.")

Even the Maryland State Court of Appeals recently found that the matter of "standards" in educational content and methodology is beyond the pall of fair discernment. *Hunter v. Bd. of Ed. Mont. Co.*, 292 Md. 481, 439 A2d 582 (1982) ("classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught...60 Cal. App. 3d at 824-25; 131 Cal. Rept. at 860-861.")[11] Likewise lacking any acceptable standards to evaluate Havis's curriculum in the present case, only the standardless "standards" of subjective opinion, prejudice and popularity were available. However, such standardless "standards" are manifestly improper as a basis

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[11]The inherently subjective nature of education and teacher training is particularly apparent in the field of Montessori education where various private organizations are engaged in notorious controversy and dispute as to "what is 'Montessori'?". Since no single "Montessori" organization has exclusive legal claim to the term "Montessori" itself, its use and interpretation is therefore freely available to all. *See American Montessori Society, Inc. v. Association Montessori Internationale*, 155 U.S.P.Q. 591, 592 (1967) in which the U.S. Patent and Trademark Trial and Appeal Board refused to grant exclusive use of the term "Montessori" to any one particular "Montessori" organization since "the term 'Montessori' has a generic and/or descriptive significance."

upon which to censor the content of Havis's private school curriculum. Subjected to such an unfavorable standardless censorship of curriculum content, Havis was thereby unjustly prohibited from operation of his private teacher training school without due process of law in violation of the First and Fourteenth Amendments of the United States Constitution.

II.

MD. EDUC. CODE ANN. §§ 2-206 AND 12-201 *et seq.* ARE UNCONSTITUTIONAL ON THEIR FACE

MD. EDUC. CODE ANN. §§ 2-206 and 12-201 *et seq.* are unconstitutional on their face as a prior restraint on First Amendment expression without sufficiently objective standards to restrain their overbroad and unconstitutional enforcement. Notably, these laws institutionalize such sweeping discretionary powers in their enforcement as to extend far beyond mere "regulation" to permit state action to suppress unpopular curriculum expression and otherwise impose tyrannical governmental domination over a private school's most intimate and essential details, including a school's own "educational qualifications and standards." *See* Appendix G, p.4g, 6g, MD. EDUC. CODE ANN. §§ 2-206(e)(2) and 12-203(b). The Board is thus empowered to prohibit and censor private school operation and curriculum expression guided essentially only by the standardless standards of that which is somehow perceived to be "adequate and appropriate."[12]

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[12]*See* Appendix G, p.6g, MD. EDUC. CODE ANN. § 12-203(b) ("The State Board for Higher Education shall issue a certificate of approval to an institution of postsecondary education if it finds that...educational qualifications and standards are adequate and appropriate...")

Legislation such as MD. EDUC. CODE ANN. §§ 2-206(e) and 12-203, which establish and permit a prior restraint on First Amendment expression, i.e., censorship, is presumptively unconstitutional. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1970). The phrase "adequate and appropriate" in the censorship legislation at issue in the present case is certainly not the type of narrow, objective and specific standards which would sufficiently restrain a state agency's enforcement of such legislation within permissible constitutional bounds. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969) ("A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective and definite standards to guide the licensing authority is unconstitutional").

The Board in the present case relied on the authority of MD. EDUC. CODE ANN. § 12-201 *et seq.* to prohibit the operation of Havis's private school based solely on a standardless subjective review of his curriculum. Such actions clearly demonstrate the expansive reach of the legislation on its face to permit infringement of First Amendment freedoms. Accordingly, the language of such legislation is so overbroad, indefinite and vague in this regard as to lack any significant limitation or guidance with respect to its proper constitutional enforcement and application.

MD. EDUC. CODE ANN. §§ 2-206 and 12-201 *et seq.* also fail to pass constitutional muster on their face as lacking proper procedural safeguards which are required for legislation such as this which imposes a prior restraint on First Amendment expression. *Southeastern Promotions Ltd. v. Conrad*, 402 U.S. 546, 558-559 (1974). Censorship laws, such as MD. EDUC. CODE ANN. §§ 2-206 and 12-201 *et seq.*, can only constitutionally restrain such expression for brief periods of time and the burden of initiating judicial review and proving the censored material "unprotected" by the First Amendment must rest with the censor. The censorship legislation at issue here fails to provide proper procedural safeguards since a prior restraint of First Amendment expression for over *six months* of time is permitted before a Board hearing

may be requested. *See* Appendix G, p.6g, MD. EDUC. CODE ANN. § 12-203(c)(3). In the instant case, the period of prior restraint before the Board's final decision to deny approval was some *one and half years*. In addition, the legislation at issue here does not require that the Board ever initiate any judicial review for an adverse Board decision nor does it require that the Board prove the censored material is "unprotected" by the First Amendment. Rather, all the burden of instituting judicial review and proving the protected nature of the censored material rests squarely with the institution being censored. *See* Appendix G, p.7g MD EDUC. CODE ANN. § 12-203(d)(2) ("The decision of the Board shall be presumed correct, and the institution has the burden of proving otherwise.")

The constitutionality of MD EDUC. CODE ANN. §§ 2-206 and 12-201 *et seq*. on their face has no basis in reliance on the state court ruling in *Schneider v. Pullen*, 198 Md. 64, 81 A2d 226 (1951) such as referenced by the U.S. Magistrate in this case. Notably, the decisive ruling in *Schneider* was not one of First Amendment consideration at all, but rather limited to the purely state law issue of "unlawful delegation of legislative power." Such a purely state law issue is completely separate and distinct from the question of vagueness and overbreadth raised here with regard to the proper guidance in the enforcement of legislation involving the denial of First Amendment freedom.[13] Moreover, *Schneider* was decided by

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[13]In brief, the issue of proper legislative guidance to enforce the sweeping legislative powers at issue in the present case was simply not considered in the ruling of the *Schneider* court. The issue in *Schneider* was that of "unlawful delegation of legislative power" which treated the purely state law matter of "separation of powers" between and among the legislative and administrative branches of the state government. Accordingly, the *Schneider* court essentially disregarded the separate issue of the validity of the legislative powers *per se* which are at issue in the present case. In *Schneider*, the Maryland State Court of Appeals rested its ruling on an issue of purely state law. Such ruling in *Schneider* was therefore totally separate and distinct from the type of judicial consideration and judgment sought in the instant case as to the requirements for proper legislative guidance in the curtailment of First Amendment freedoms

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the Maryland Court of Appeals before any enforcement measures or regulations had ever been established or implemented. Accordingly, the state court in *Schneider* specifically declined to extend its ruling to the possible implications of the legislation's actual enforcement or application by government officials and agencies, such as now clearly at issue in the present case. Since *Schneider* never decided the facial validity of the legislation in question with regard to the federal constitution, the legislation's possible infringement of First Amendment freedoms was likewise outside the domain of the *Schneider* ruling. Therefore, this Court is neither bound nor should it be otherwise influenced by *Schneider* with respect to the issues addressed in the instant case.

Furthermore, less drastic legislative means—short of the standardless, subjective censorship of private school curriculum permitted under the current legislation—are readily available to meet any legitimate governmental interest in the regulation of private schools. Notably, Havis has proposed a specific legislative remedy in this regard. In any case, the type of repressive and prejudicial prohibition of unconventional or unpopular private school curriculum such as clearly permissible under the current legislation, is overly drastic to say the least and therefore fatally lacking any proper governmental purpose or function in this regard. *Shelton v. Tucker*, 364 U.S. 479 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools...the breadth of legislative abridgement must be viewed in the light of the less drastic means for achieving the same purpose.")

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under the federal constitution. *See Panama Refining Co. et al. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446, 478 (1934) ("...there is nothing in the federal constitution to prevent a state legislature from delegating to another department, board, commission, or officer of the state government, any legislative function within the province of the legislature itself that it sees fit to delegate."); *See* also *Highland Farms Dairy, Inc. et al. v. Agnew et al.*, 300 U.S. 608, 612 (1936) ("How power shall be distributed by a state among its governmental organs is...a question of state law itself...")

III.

THE ISSUE OF VIOLATION OF THE ESTABLISHMENT CLAUSE WAS IMPROPERLY AVOIDED

The First Amendment of the United States Constitution prohibits government legislation with respect to an "establishment of religion". *See* Appendix G, p. 1g ("Congress shall make no law respecting an establishment of religion...") The Fourteenth Amendment of the United States Constitution applies such prohibition as fully to the legislation of state government as challenged here in this regard, as it does to that of the United States Congress. *Wallace v. Jaffree*, _____ U.S. _____ (1985), 45 CCH S. Ct. Bull. P. B3251 (decided June 4, 1985).

The statute questioned in the present case as violating the Establishment Clause of the First Amendment is MD. EDUC. CODE ANN. § 2-206 wherein paragraph (e) (4) mandates a blanket exemption from Board certification and approval for all non-collegiate educational institutions "operated by a bona fide church organization, including the Amish and Mennonite church parochial schools." *See* Appendix G, p. 5g. Since secular non-public schools such as that intended for operation by Havis remain fully subject to Board certification under Section 2-206, a discriminatory advantage favorable to the exempted class of religious private schools is plainly evident on the face of the legislation. Such legislative advantage therefore clearly aids in the establishment of the religions affiliated with the exempted schools.

In the case-at-bar, the court refused to rule on the issue of violation of the Establishment Clause raised by Havis because the exemption of Section 2-206(e)(4) was somehow deemed "immaterial"

to Havis's complaint.[14] Accordingly, Havis's claim of invidious discrimination with regard to violation of the Establishment Clause in the enforcement of Section 2-206 against his private school operation was left without any substantive consideration or judicial relief whatsoever.

In asserting its "severability" rationale to avoid the issue of violation of the Establishment Clause in this case, the court has necessarily assumed a constitutional validity to full imposition of Section 2-206 Board certification powers over all exempted religious private schools. However, the constitutionality of such a sweeping intrusion of governmental powers to censor and otherwise control the most intimate and essential details of all private education, regardless of its tangible protected First Amendment or religious nature, content or expression, is contested here and, in any case, highly speculative to say the least. Aside from the facial invalidity of unrestrained governmental intrusion into private educational expression such as implicated in the enforcement of Section 2-206, the more fundamental error of the court's misapplied "severability" rationale is its total failure to effectively address, much less resolve, the essential underlying issue of invidious discrimination against Havis in this case. Such invidious discrimination, not freedom from Board certification powers, is that which lies at the core of violation of the Establishment Clause as raised in the instant case. Accordingly, the court's avoidance of the issue of violation of the Establishment Clause has likewise improperly avoided consideration of the more fundamental injustice claimed in this

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[14]The court below adopted the magistrate's proposition that the exemption for religious private schools in Section 2-206(e)(4) was somehow "severable" from the effect of the remaining portion of the statute on Havis. Specifically, the magistrate reasoned that: "the unconstitutionality of the religious exemption is immaterial to plaintiffs' case. The only effect of declaring the exemption unconstitutional would be that educational institutions operated by bona fide church organizations would be subject to state certification. Accordingly, this Court declines to reach the question of whether the exemption represents an unconstitutional establishment of religion." *See* Appendix E, p. 18e.

regard; i.e., the unequal treatment of private schools based on religion, resulting in the discriminatory enforcement of Board certification powers under Section 2-206 against Havis.

The magistrate's "severability" rationale employed in the instant case postulated that the form of judicial relief requested by Havis has somehow disqualified him from receiving any substantive consideration of the issue of violation of the Establishment Clause. Presumably, had Havis sought the relief of forcing exempted religious private schools to submit to the same Section 2-206 certification restrictions as imposed on his own private school operation, instead of the remedy of equal freedom in this regard, the court would have then been compelled to afford its consideration. However, such a technical distinction is an invalid basis for refusal to exercise the court's properly invoked jurisdiction in this regard. Either form of relief in question would afford an essential resolution of the claimed injustice. Since the issue of violation of the Establishment Clause as raised in this case involves at its core the more fundamental issue of unequal enforcement of legislation against Havis, the particular choice of judicial relief sought or rendered in this regard is immaterial to its essential resolution.[15]

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[15]Unequal treatment of private schools based on religion is the core issue which underlies the violation of the Establishment Clause in this case. The specific type of remedy which might be employed to resolve this underlying unequal treatment is essentially immaterial. The unconstitutionality of unequal treatment of private child care centers based on religion was recently held a violation of the Establishment Clause and was resolved by equal imposition of legislation in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F2d 230 (CA4, 1984). *See* also *Milwaukee Montessori School v. Percy*, 473 F. Supp. 1138 (1979) where the judicial remedy afforded for unequal treatment of private schools based on religion was provided in the form of equal freedom which is requested here by Havis. In the case-at-bar, the remedy of equal *freedom* from enforcement of Section 2-206 is sought rather than equal *imposition* of such legislation. However, even a declaratory judgment, or injunction compelling exempted religious schools to submit to § 2-206 certification would at least offer the relief of placing such exempted religious schools on an equal competitive footing with that of Havis. In any case, unequal enforcement of

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The issue of violation of the Establishment Clause as presented here is only one aspect of the more basic issue of unequal enforcement of § 2-206 based on religion. Such unequal enforcement also necessarily entails the denial of Havis's right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Regardless of the court's rationale as to "severability" related to the form of judicial relief requested, the issue of equal protection of the laws under the Fourteenth Amendment would nonetheless clearly remain for disposition in any case.[16] Judicial discretion in the consideration of such a legal issue properly before the court in this case does not extend so far as to permit its wholesale and groundless avoidance under the guise of some sort of "severability" rationale. Having now once clearly asserted its jurisdiction as proper to resolve the constitutional issue of violation of the Establishment Clause presented here, the court should have accordingly proceeded with an appropriate final disposition of the substantive merits in this regard.[17]

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the laws based on religion is the central issue for resolution in this case and no interpretation of "severability" can disguise the court's improper refusal to address such issue here as compelled by its jurisdictional mandate invoked for such purpose in this regard.

[16]The exemption for certain private religious schools is also challenged by Havis as an invidious discrimination in violation of the Fourteenth Amendment as a denial of equal protection of the laws ("No State shall...deny to any person within its jurisdiction equal protection of the laws". *See* Appendix G, p.1g). Under Section 2-206(e)(4), religious private schools are clearly favored in their operation whereas Havis's private school operation is subjected to discriminatory enforcement of restrictive regulation, certification and approval requirements.

[17]Federal jurisdiction to resolve the issue of violation of the Establishment Clause was clearly settled in *Educational Services, Inc. et al. v. Maryland St. Bd. for Higher Ed.*, 710 F2d, 170, 171-72 (Appendix D, p. 3d-4d). Notably, at 710 F2d 176 fn.1 (Appendix D, p. 12d), the Court of Appeals for the Fourth Circuit specifically referred to the question of the constitutionality of the religious exemption of MD. EDUC. CODE ANN. §2-206(e)(4) as a primary claim of Havis which is "...central to this case.".

The applicable analysis of a statute's avoidance of violation of the Establishment Clause is set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster an 'excessive government entanglement with religion'." MD. EDUC. CODE ANN. § 2-206(e)(4) fails on all three counts.

There is no rational "secular purpose" in granting certain private schools a wholesale exemption from any and all government oversight, approval or regulation under MD. EDUC. CODE ANN. § 2-206, while other schools must accordingly comply, merely because these exempted schools are sponsored by a "bona fide church organization". If § 2-206 is not wholly unconstitutional itself for reasons stated elsewhere here, such a blanket exemption for religious private schools as provided in § 2-206(e)(4) is facially overbroad as a permissible accommodation to any rights of the schools' sectarian owners to protect their "free exercise of religion" under the First Amendment. *See* Appendix G, p.1g. *See* also *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F2d, 230, 233 (CA4, 1984). Notably, the mere fact that a private school is sponsored by a "bona fide church organization" does not thereby somehow disassociate its essential purpose and function from that of any other institution for the education of children. Aside from whatever religious atmosphere may be present in private schools exempted under § 2-206(e)(4), their function, purpose and operation is essentially similar to that of any other educational institutions, involving such common elements as the operation of curriculum, instruction, teachers, tuition and administration. To compel some schools to comply with certain educational regulation under § 2-206 while exempting others merely because of their religious affiliation is therefore plainly without any discernible legislative purpose.

In addition, the enforcement of § 2-206(e)(4) necessarily entails a sweeping exemption from any regulation whatsoever for the vast

majority of private schools.[18] Accordingly, enforcement of § 2-206 against the relatively small number of remaining non-exempt private schools readily calls into question the existence of any genuine legislative purpose to the entire statute itself. In any case, the § 2-206(e)(4) exemption is plainly lacking any proper secular purpose and therefore fails to meet this element of the test in *Lemon v. Kurtzman.*

The primary effect of § 2-206(e)(4) is to benefit and advance the religion of the exempted private schools. Such benefit is indirect yet very tangible, consisting of a freedom from costly, burdensome regulation with which non-exempt private schools must fully comply. Exempted religious private schools are therefore placed in a superior competitive position with respect to the non-exempt schools since the exempted religious schools may hire whomever they wish as teachers and conduct whatever curriculum they desire — without regard to the otherwise burdensome limitations and restrictions of regulatory impositions pursuant to § 2-206.

Government entanglement with religion is evident under the enforcement of § 2-206(e)(4) since the Board somehow determines which church organizations are "bona fide" and which are not.

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[18]*See Sloan v. Lemon*, 413 U.S. 825, 830 (1972) ("more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating and promoting religious faith.") Like the Commonwealth of Pennsylvania, the State of Maryland would undoubtedly contain an equally vast majority of private schools affiliated with some religious organization, therefore presumably qualified for the Section 2-206(e)(4) exemption. Accordingly, only a relatively few private schools, such as Havis's Capital Tutoring school, would find themselves compelled to comply with the regulatory restrictions challenged here as unconstitutional. It would be wholly irrational to assume a proper legislative purpose on behalf of the public interest to establish a massive regulatory restriction and all-inclusive control over only a tiny minority of private schools while the vast majority of other such private schools are without any oversight whatsoever merely because of their identification with some sort of "bona fide" religion.

Specific administrative procedures are conducted by the Board in this regard to examine a church organization's structure based on its corporate status with the government of Maryland. Moreover, the Amish and Mennonite church parochial schools are singled out for unqualified preferential treatment, without regard to any Board determination as to their "bona fide" status whatsoever.

In sum, MD. EDUC. CODE ANN. § 2-206(e)(4) violates the Establishment Clause of the First Amendment and denies equal protection of the laws to Havis as required by the Fourteenth Amendment. Since the court has improperly refused to consider this issue in this case, Havis is left without redress or remedy for an invidious discrimination based on religion which is readily apparent in the enforcement of MD. EDUC. CODE ANN. §2-206.

IV.

SUMMARY JUDGMENT WAS IMPROPERLY GRANTED UNDER RULE 56, F.R. CIV. P.

Summary judgment under Rule 56, F.R. Civ. P. may be granted only where "there is no genuine issue as to any material fact" and the court is thus compelled to find "that the moving party is entitled to a judgment as a matter of law." *See* Rule 56(c), F.R. Civ. P. (Appendix G, p.12g). The material facts must therefore be beyond genuine dispute and any inferences to be drawn in this regard must only be viewed "in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 82 S. Ct. 993, 369 U.S. 654, 655, 9 L. Ed. 2d 176 (1961).

In the case-at-bar, the essential requirements for granting summary dismissal of Havis's complaint under Rule 56, F.R. Civ. P. were simply not met. Notably, the court essentially misconstrued the law applicable to the facts in this case. Moreover, the court's

erroneous legal conclusion as to the constitutionality of the Board's prohibitory suppression of Havis's curriculum expression was premised on improper inferences which were drawn contrary to the plainly evident facts. In any case, such improper inferences were certainly contrary to that which would favor Havis as required by *U.S. v. Diebold, Inc., supra.*[19] The court's summary dismissal of

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[19]The magistrate's findings of undisputed basic facts in this case were that the Board prohibited the operation of Havis's private Montessori teacher training school based upon an adverse review of its curriculum content. That the Board's prohibitory actions in such a suppression of Havis's assertedly novel communication in private education were somehow fair and reasonable as inferred by the magistrate is neither suggested nor implied by the undisputed facts on their face. Moreover, such inferences are simply erroneous upon a fair scrutiny of the documentary evidence in the record presented here. Indeed, the basic undisputed facts found by the magistrate essentially substantiated the claims of deprivation of constitutional rights asserted by Havis in his complaint. Properly construed, the pertinent law applied to the material facts therefore should have compelled the court to issue summary judgment for Havis as to declaratory and injunctive relief as requested in this regard.

Havis's claims of deprivation of constitutional rights set forth in his complaint have already been essentially accepted as proper grounds to assert federal jurisdiction. *See Educational Services, Inc. et al. v. Maryland St. Bd. for Higher Ed.*, 710 F2d 170, 171 fn. 3 (CA4, 1983), Appendix D, p. 3d ("Havis asserts that the language of Section 12-203(b) . . . admits of abuse through academic content censorship, and that a standardless and subjective review of content occurred in the denial of his application.") The magistrate's findings of undisputable facts in this case actually substantiated the essential factual allegations asserted by Havis in this regard. Accordingly, the magistrate's improper inferences against Havis as to fairness and reasonableness in the Board's prohibitory actions are disputable to say the least. At a minimum, such inferences presented a genuine issue in the case so as to invalidate the court's dismissal of Havis's complaint by summary judgment under Rule 56, F.R. Civ. P. The court's summary dismissal proceedings here were particularly inappropriate since the underlying questions of prejudice and standardless subjectivity in the censorship of private school curriculum as presented in this case so clearly implicate the deprivation of fundamental First Amendment freedoms of expression and communication. *Board of Education v. Pico*, 457 U.S. 853, 871-872 (1982).

Havis's complaint was therefore improper under Rule 56, F.R. Civ. P. as being based squarely on inferences which were erroneously drawn and unduly weighted against Havis, the party opposing the motion in this regard.

Specifically, the court improperly inferred the presence of "deficiencies" in the curriculum, a proposition whose only discernible basis lies in an equally improper and disputable inference that all the curriculum reviewers were somehow "qualified" to properly determine the matter in this regard.[20] Such inferences were made

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[20]One curriculum reviewer, "qualified" under the court's inference in this regard, Dr. Thomas Yawkey, rendered a completely affirmative and favorable recommendation for approval of Havis's curriculum. The court, however, refused to consider the merits or significance of this particular opinion, relying instead on the adverse opinion to the contrary. However, specific comments and criticisms of all adverse curriculum reviewers differed considerably among themselves, there being no genuine "consensus of opinion" as to the specific nature and substance of the so-called "deficiencies". The only "consensus" among the opponents of Havis's curriculum was the conclusion for "disapproval". Some curriculum reviewers were specifically informed in writing by the Board as to the curriculum's prior disapproval. Such detrimental information was provided with the Board's request for the reviewer's opinion, thus laying the basis for obvious prejudice as to their prospective opinion against approval.

In any case, the Board's "notice of deficiencies" related only vaguely to the actual comments of disapproval and adverse subjective opinion expressed by some of the curriculum reviewers. The so-called "deficiencies" ennumerated by the Board were wholly subjective in nature; vague unsubstantiated generalizations whose communication to Havis could hardly be fairly characterized as even minimal "notice" in this regard. Havis was thus informed only that certain portions of the curriculum were somehow "too long", lacking in "sufficient structure" or "not adequate". Entrance requirements were somehow "incomplete" as presumably lacking some requirement for prior training in traditional teaching methodology and some sort of acceptable "child psychology"

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by the magistrate without having taken any oral testimony, relying solely on written documentary evidence and transcript of a prior hearing which clearly reflected a facial prejudice and standardless subjectivity with regard to review of the curriculum content in question. No genuine regard was given to the obvious prejudice of adverse curriculum reviewers as alleged by Havis. Nor were Havis's assertions of unfairness in the certification denial proceedings given any proper weight or significance. Rather, the court pointedly emphasized the Board's hollow gestures to offer Havis "assistance" and other such equally superficial gestures and formalities. The requirements for constitutional due process were improperly associated with perfunctory administrative routine and procedures consisting essentially of a so-called "hearing" and "notice" which were neither impartial nor legally adequate. The magistrate's inferences to the contrary in this regard were therefore clearly improper under the requirements of Rule 56, F.R. Civ. P. Indeed, such superficial formalities as the so-called "hearing" and "notice" afforded to Havis amounted essentially to mere camouflage disguising the underlying true nature of the Board's consistent pattern of arbitrary unfairness and prejudice with which Havis was compelled to contend

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instruction from a state-accredited institution. No indication was given as to how such so-called "deficiencies" could be objectively addressed or resolved by Havis to conform to acceptable length or sufficiency. No objective standards were ever given to Havis or referenced with regard to acceptable content. Presumably, the only acceptable entrance requirements would be those which would limit enrollment to those persons who had already been so fully subjected to prejudicial indoctrination and teaching methodology contrary to that of true Montessori teaching as intended by Havis that their ability to function otherwise would have been effectively extinguished from the outset. *Ratnayake v. Mack*, 499 F2d 1207, 1211 (CA8, 1974); *See* also *Education for a new World*, by Maria Montessori, p. 66-67, Kalakshetra Publ., Madras 41 India, 1974 (". . . with teachers from the usual types of Training Colleges . . . prejudices are so deeply rooted that they are incurable.")

throughout the entire process of certification denial which extended over a period of some one and a half years.[21]

The court's summary dismissal of Havis's complaint was therefore invalid as contrary to applicable law in the case and, moreover, erroneously based on inferences improperly drawn against Havis contrary to the requirements of Rule 56, F.R. Civ. P.

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[21]In fact, the Board's actions against Havis during the lengthy certification denial proceedings were replete with prejudice, delay, unfairness and blatent disregard of well-established criteria for basic due process. The so-called "notice of deficiencies" was incomprehensibly vague in its generalized subjectivity and based totally on blatent prejudice as to curriculum content. In addition, the so-called "hearing" of July 2, 1981 amounted to essentially a meaningless procedural formality wherein the Commissioner's prior position of disapproval of Havis's curriculum was prejudicially favored. Notably, the Commissioner engaged in adverse *ex parte* communication with the Board during the period of preparation for the hearing. Moreover Havis was informed by a Board member that the Commissioner also engaged in substantive *ex parte* communication with the Board during their executive session held just prior to taking their adverse vote against Havis on July 2, 1981. The full extent of these and other such prejudicial proceedings have not been discovered as yet by Havis since the Board's motion for a protective order preventing such discovery was most promptly granted by the district court. Such protective order itself was challenged in the district court as an improper *ex parte* proceeding since Havis was afforded no reasonable opportunity, if any, to be heard before its issuance. Havis's motion for sanctions and vacation of such protective order was never resolved and remained pending in the district court at the time of the complaint's summary dismissal.

V.

A GENUINE *DE NOVO* DETERMINATION WAS NOT CONDUCTED AS REQUIRED BY RULE 72(b), F.R. CIV. P.

Since the district court judge assigned preliminary motions in this case to a U.S. Magistrate, without the consent of the parties, disposition of such matter must necessarily comply with the requirements of Rule 72(b), F.R. Civ. P. (Appendix G, p.13g). Pursuant to such rule, the magistrate filed his report and recommendation (Appendix E) and Havis thereupon submitted detailed, timely objections to the district judge. Thereafter, the district judge issued a perfunctory order adopting *in toto* the magistrate's entire report and recommendation. *See* Appendix F.

In reviewing Havis's written objections to the magistrate's report filed pursuant to Rule 72(b), F.R. Civ. P., the district judge was clearly required to conduct a genuine *de novo* determination of the matters in dispute.[22] Such a *de novo* determination compels the district judge to reconsider afresh the matters at issue in the magistrate's report with no presumption whatsoever as to any validity of the content of such report. *See* 7 *Moore's Fed. Practice*, 72.02 (10-2), p.72-69, 70 (". . . the district judge may not simply 'rubber stamp' the disposition recommended by the magistrate.").

In the instant case, some 43 pages of specific written objections were submitted to the district judge for his *de novo* review pursuant to Rule 72(b), F.R. Civ. P. In addition, 14 pages of proposed findings of fact and conclusions of law were likewise submitted for consideration. In adopting *in toto* the magistrate's report

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[22]Rule 72(b), F.R. Civ. P. provides in this regard that "The district judge . . . shall make a *de novo* determination upon the record . . . of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule." *See* Appendix G, p.13g.

and recommendation, without any substantial comment regarding these written objections, and without the benefit of oral argument or further testimony, the district judge's *in toto* order amounted to essentially a "rubber stamp" of the magistrate's report. Such a "rubber stamp" adoption of the magistrate's report clearly failed to constitute a genuine *de novo* review as required by Rule 72(b), F.R. Civ. P. and merits reversal or remand as the case may be.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Counsel for Petitioner

LEE HAVIS (Pro Se)

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit were mailed this _____ of January, 1986, postage prepaid, to STEPHEN H. SACHS, ESQ., KAREN HORNIG, ESQ., RALPH TYLER, ESQ., Office of the Attorney General, Seven North Calvert St., Baltimore, Maryland 21202.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1060(L)

EDUCATIONAL SERVICES, INC., ETC., ET AL., Appellants,

v.

MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL., Appellees.

No. 85-1378

EDUCATIONAL SERVICES, INC., ETC., ET AL, Appellants,

v.

MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL., Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge. (CA 81-2474).

Argued: August 15, 1985 Decided: September 30, 1985

Before MURNAGHAN and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Lee Havis Pro Se. Karen Staken Hornig (Stephen H. Sachs; Ralph Tyler on brief) for Appellee.

PER CURIAM:

Appellants appeal from the grant of summary judgment to appellees on the merits of the case. In a subsidiary aspect of the case, appellants seek reversal of a decision of the district court declining to re-tax certain costs which had been awarded in the amount of $419.00. The contention is that interest in the approximate amount of $72.00 was improperly disallowed.

As pointed out in an earlier version of the case, *Educational Services, Inc., v. Maryland State Board for Higher Education*, 710 F.2d 170, 171-172 (4th Cir. 1983), the significant claims of Lee Havis, one of the plaintiffs/appellants, who appeared as counsel for appellants, were as follows:

> His principal claim is that the certification powers delegated to the Board under §§ 12-201 *et seq.*, Ann. Code of Maryland, Education (1982 Cum.Supp.), permit the Board unconstrained discretion to deny certification to unconventional or controversial applicants. Havis's second major contention is that the statutory exemption for religious non-public "non-collegiate educational" institutions found in § 2-206(e)(4) of the Education Article violates the Establishment Clause because secular non-public schools such as Capital Tutoring remain fully subject to Board certification.

The case was referred to Magistrate Frederick Smalkin for a report and recommendation as to disposition of a motion by defendants to dismiss and plaintiffs' reply to that motion. The motion

to dismiss was treated as a motion for summary judgment.[1] Magistrate Smalkin's report and recommendation, filed November 15, 1984, comprehensively and accurately stated the applicable law and correctly recommended its application insofar as the claims on the merits are concerned. We affirm the award of summary judgment to appellees on the report and recommendation of the magistrate and the order of December 18, 1984 by the district judge adopting *in toto* the magistrate's report and recommendation. *Educational Services, Inc., et al. v. Maryland State Board for Higher Education, et al.*, United States District Court for the District of Maryland, Civil Action HAR-81-2474 (Nov. 15, 1984 and Dec. 18, 1984).

With respect to the claim for interest on the allowance of costs, costs shall be allowed only as ordered by the court. FRAP 39(a).[2] While 28 U.S.C. § 1961(a) calls for allowance of interest on any recovery through money judgment in a civil case, the allowance of costs here involved was not a money judgment in the sense that term is employed in 28 U.S.C. § 1961(a). Denial of interest was a matter committed to the sound discretion of the district court, and that discretion has not been abused in the instant case. We, therefore, affirm the disposition of the district court with respect to that matter also.

AFFIRMED.

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[1]*See* Fed. R. Civ. P. 12(b).

[2]The appellate costs of $419.00 were incurred in securing vacation of a district court determination that application of the doctrine of abstention was appropriate. Taxation of the costs takes place in the district court. FRAP 39(e).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: NOV. 7, 1985

No. 85-1060

EDUCATIONAL SERVICES, INC., ETC., ET AL., Appellants,

v.

MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL., Appellees.

No. 85-1378

EDUCATIONAL SERVICES, INC., ETC., ET AL, Appellants,

v.

MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL., Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge.

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Chapman and Judge Haynsworth.

For the Court,

John M. Greacen
CLERK

APPENDIX C

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EDUCATIONAL SERVICES, INC., ETC., ET AL., Plaintiffs	)	
v.	)	CIVIL No. JH-81-2474
MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL., Defendants	)	

MEMORANDUM

Pending before the Court is the plaintiffs' motion for preliminary injunction and the defendants' motion to dismiss or alternatively, for summary judgment. Oral argument on the plaintiffs' motion for preliminary injunction was heard on November 24, 1981. The Court has considered the defendants' motion to dismiss and the plaintiffs' response thereto and determined that no hearing is necessary for its resolution. Local Rule 6.

As a preliminary matter, the Court will rule on the admissibility of plaintiffs' Exhibits 4 and 9. *See* plaintiffs' Hearing Exhibits. Plaintiffs' Exhibit 4 is relevant to the Court's consideration of the plaintiffs' claim and, therefore, defendants' objection to its introduction into evidence is hereby overruled. Fed. R. Evid. 401. Plaintiffs' Exhibit 9 is a photocopy of a letter that is undated,

unsigned and does not specify an addressee. The defendants' objection to the authenticity of this letter is hereby sustained. Fed. R. Evid. 901.

Having heard the arguments of counsel at the hearing on plaintiffs' preliminary injunction motion, the Court finds that the abstention issue raised by the defendants is dispositive. For the reasons stated herein, this action is remitted to the state courts for resolution on the merits.

Pullman Abstention.

The judge-made doctrine of abstention was first formulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In *Pullman*, the Supreme Court ruled that a federal district court should abstain from decision if the dispute before it (1) implicates a sensitive area of social policy, (2) involves an unsettled question of state law and (3) involves a federal constitutional question that can be avoided by a state court's interpretation of the state law. *See, Belloti v. Baird*, 428 U.S. 132, 147-8 (1976); *Moore v. Simms*, 442 U.S. 415, 427-28 (1979). In the instant case, Maryland's educational accreditation standards clearly constitute a sensitive area of social policy. Therefore, the first prerequisite for abstention under the *Pullman* doctrine is present.

The second *Pullman* requirement is that there must be "an unsettled question of state law." It is undisputed that the statutes at issue here have never been construed by the state courts. However, the plaintiffs rest their opposition to abstention on the argument that a virtually identical statute has been interpreted by the Maryland Court of Appeals.

The plaintiffs' argument relies solely on the case of *Schneider v. Pullen*, 81 A. 2d 226, 198 Md. 64 (1951). In *Schneider*, the appellant was the owner and operator of a private trade school who sought to avoid the statutory requirement that such a school must obtain a certificate of approval from the state in order to operate. The challenged statute in the *Schneider* case contains language identical to that in the statutes at issue in the instant case. *See* § 14A, Art. 77, Ann. Code of Md. (as amended by the Acts of 1947) and § § 2-206, 12-201-7, Education, Ann. Code of Md. The main contention of the appellant in *Schneider* was that the act was "an unlawful delegation of legislative power because it provides no definite standards by which the State Superintendent of Schools is to be guided in issuing his regulations. . ." *Schneider, supra*, at 229. The *Schneider* court found this argument to be without merit and held that the "standards prescribed for so broad a subject are sufficiently definite for us to hold that the statute is not subject to constitutional objection on this ground."

If the unlawful delegation claim was the only claim made by plaintiffs in this action, their cause of action would be dismissed for the reasons given by the state court in *Schneider*. However, the plaintiffs' allegations go beyond the delegation issue to challenge the constitutionality of the specific acts of the Commissioner and staff members of the Maryland State Boards of Higher Education. Additionally, plaintiffs contend that the regulations of the Board are unreasonably vague and discriminatorily applied. As *Schneider* does not address either of these issues, they remain unsettled as a matter of state law. The state court may well resolve these issues in a way that would avoid consideration of a constitutional question by the federal courts.

In summary, *Pullman*-type abstention is appropriate in the instant case as there is a dispute concerning a sensitive area of social policy, an unsettled area of state law involved, and a federal constitutional issue which could be avoided by a state court determination.

Burford Abstention

The second kind of abstention implicated in this case is defined by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and its sequelae. The *Burford* case was an action in federal court attacking the validity of a permit to drill an oil well in an East Texas oil field. The Supreme Court sanctioned abstention in this case to prevent federal interference with a complex state regulatory scheme. Thus, under *Burford*, a federal court must abstain in order to avoid the "hazard of unsettling some delicate balance in the area of federal-state relationships." *Louisiana Power & Light Co. v. City of Thibodaux*, 340 U.S. 25, 32. As Justice Brennan wrote for the majority in *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814-16, (1976):

> Abstention is. . .appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . .[T]he state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Maryland has developed a complex regulatory policy to effectuate its interest in educating its citizens. The state educational accreditation standards that were developed pursuant to that policy are a matter of substantial public concern within the meaning of the *Burford* case. *See Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949). For this reason, the state courts should be afforded the first opportunity to interpret those standards without the interference of the federal courts.

As abstention is justified under both the *Pullman* and *Burford*-type doctrines in the instant action, the Court will dismiss the case as in *Burford* rather than stay proceedings as in *Pullman*. *See* 17 Wright & Miller, Federal Practice and Procedure: Jurisdiction and Related Matters § 245.

A separate Order confirming this ruling will be entered.

[signed]

Joseph C. Howard
United States District Judge

Date: January 6th, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDUCATIONAL SERVICES, INC., ETC., ET AL., Appellants,	)	
v.	)	No. 82-1098
MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL., Appellees.	)	

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge.

Argued March 9, 1983 Decided June 23, 1983

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and ALDRICH,* Senior Circuit Judge.

Lee Havis for Appellants; Ellen M. Heller, Attorney General's Office (Stephen H. Sachs, Attorney General of Maryland, Susan B. Blum, Assistant Attorney General, Susan J. Mathias, Assistant Attorney General, Judith A. Wood, Staff Attorney on brief) for Appellees.

*Honorable Bailey Aldrich, Senior United States Circuit Judge for the First Circuit, sitting by designation.

WINTER, Chief Judge:

Faced with a broad-ranging and intricate constitutional challenge to Maryland's certification process governing the operation of a private teacher training school, the district court abstained, dismissing the suit. Plaintiffs appeal, contending principally that this suit is not among the various situations in which abstention is warranted. We agree. Plaintiffs also contend that they were entitled to a default judgment. Although we affirm the district court's denial of plaintiffs' motion for default judgment, we reverse the judgment of dismissal and remand to the district court to allow the case to proceed. We do not pass upon plaintiffs' contention that they are entitled to interim injunctive relief.

I.

This suit stems from efforts by Lee Havis, the owner and executive director of co-plaintiff Educational Services, Inc., to obtain a certificate of approval from the Maryland State Board for Higher Education (Board) for the operation of a post-secondary teacher training school under the name International Montessori Society (IMS).[1] Havis, who also owns a private tutoring school named Capital Tutoring, Inc., first applied for the Board's certificate in February, 1980. After extensive administrative review, the Board, on July 2, 1981, affirmed as final the consistent denial of a certificate of approval for operation of the school. Havis thus unsuccessfully exhausted all administrative remedies.

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[1]Because of the identity of interest between them, we will refer simply to "Havis" to designate plaintiffs either individually or collectively.

On September 28, 1981, Havis *pro se* brought this action seeking declaratory and injunctive relief under 42 U.S.C. §1983, alleging the denial of First and Fourteenth Amendment rights in the Board's[2] refusal to certify the IMS. Although couched in language invoking a variety of constitutional provisions, at bottom Havis alleges two principal theories of unconstitutional action. His principal claim is that the certification powers delegated to the Board under §§12-201 *et seq.*, Ann. Code of Maryland, Education (1982 Cum. Supp.), permit the Board unconstrained discretion to deny certification to unconventional or controversial applicants.[3] Havis's second major contention is that the statutory exemption for religious non-public "noncollegiate educational" institutions found in §2-206(e)(4) of the Education Article violates the Establishment Clause because secular non-public schools such as Capital Tutoring remain fully subject to Board certification.[4]

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[2]Named as defendents were the Board, its seven members in their official capacities, the Board Commissioner and various staff members, the state Board of Education, and the state Superintendent of Schools. The defendents will be referred to simply as the "Board."

[3]Havis alleges that he is such an applicant in that the proposed IMS curriculum is "unique in application and approach, outside the normally accepted standards and content of otherwise comparable conventional or traditional curricula." In particular, Havis asserts that the language of §12-203(b), requiring the Board to evaluate the "facilities, conditions of entrance and scholarship, *and educational qualifications and standards*" (emphasis added) of IMS, admits of abuse through academic content censorship, and that such a standardless and subjective review of content occurred in the denial of his application.

Havis also asserts that regulations promulgated pursuant to §12-201 — Code of Maryland Regulations §§13A.50.01 *et seq.* — do not confine the statutory discretion of the Board, but rather institutionalize it. Using its discretion under these regulations, the Board referred Havis's application for comment and evaluation to various educators, among them practitioners of the Montessori educational philosophy at other institutions employing the Montessori label in their titles.

[4]Although somewhat obtuse in alleging what harm has befallen him, inasmuch as Capital Tutoring appears to enjoy currently valid state certification, (Continued)

On the basis of these allegations and supporting affidavits, Havis moved for a preliminary injunction against enforcement of the certifications laws against him. The Board in turn moved the district court to abstain from the exercise of federal question jurisdiction and to dismiss the suit.

Granting the Board's motion, the district court first concluded that the federal constitutional questions raised by Havis could be avoided by state court interpretation of the statutes and regulations called into question, and that the interpretation of those statutes and regulations were unsettled. As a consequence, the district court held the abstention doctrine enunciated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) to be applicable. The district court further concluded that any ruling on Havis's claims would amount to federal interference with a complex state regulatory scheme, and therefore invoked the *Burford* doctrine.[5] Because it had deemed both *Burford* and *Pullman* abstention appropriate, the district court applied the harsher of the two, and dismissed the suit. *See* 17 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction §4245 (1978). Havis now appeals from that dismissal and from the denial of his earlier motion for default judgment.

Havis points out that the regulations pursuant to §2-206 require, *inter alia*, that teachers "in schools adhering to the Montessori philosophy" shall have both an accredited bachelor's degree and "a Montessori diploma" from a state accredited teacher training institution. C.M.R. §13A.09.09.05(c)(2). Havis alleges that he is thereby prevented from using teachers trained in his IMS training school in his tutoring school, whereas were he to operate a religious tutoring school he would be exempt from state oversight of his teachers' qualifications.

[5] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

II.

The cases recognize several doctrines of abstention.[6] In considering the propriety of abstention in this case, we note initially that it lacks one predicate common to at least two varieties of that doctrine, the pendency of state judicial proceedings concerning the same matters. Thus, many of the cases relied upon by the district court or cited to us by the Board are inapposite. *See, e.g., Cox v. Planning District I Community Mental Health and Mental Retardation Services Board*, 669 F.2d 940 (4 Cir. 1982); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 80 (1975) (state court action begun but "abandoned" in favor of federal court action); *Kelser v. Anne Arundel County Dept. of Social Services*, 679 F.2d 1092, 1093 (4 Cir. 1982) (numerous pending state court custody proceedings); *see also Fruchtman v. N.Y. State Bd. of Law Examiners*, 534 F. Supp. 692, 694-96 (S.D.N.Y. 1982) (N.Y. Court of Appeals, though acting administratively, had referred plaintiff back to bar review board for further proceedings prior to initiation of federal court action). As a consequence, we have only to consider *Burford* and *Pullman* abstention, and we turn to them in that order.

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[6]In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), Justice Brennan for the Court outlined the three established abstention doctrines as the *Pullman*, *Burford*, and *Younger* [*v. Harris*, 401 U.S. 37 (1971)] types, while noting that a fourth category concerned with judicial economy justified abstention in favor of ongoing state court proceedings involving issues of "extraordinary importance" in certain limited circumstances. 424 U.S. at 818-19; *See also Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, _____ U.S. _____, 103 S. Ct. 927, 74 L. Ed.2d 765 (1983); *Cox v. Planning District I Community Mental Health and Mental Retardation Services Board*, 669 F.2d 940, at 942 (4 Cir. 1982). Whether this fourth category is in fact a distinct basis for abstention, or instead is more an extension of the *Younger* line premised upon the lack of federal jurisdiction to restrain good faith state criminal prosecutions into the civil area, *cf. North v. Budig*, 637 F.2d 246, 249-50 (4 Cir. 1981), the absence of "the danger of piecemeal litigation" makes that line of abstention also unavailable here. *Cone Memorial Hospital, supra*, _____ U.S. at _____, 103 S. Ct. at 939, 74 L. Ed.2d at 782.

A. *Burford* Abstention

The Board urges us to adopt the proposition that, because regulation of non-public schools furthers important state educational policies, any case arising from such regulation must be considered as involving the kind of complex state regulatory scheme which merits *Burford*-type abstention. While we acknowledge the important and sensitive nature of state educational regulation, we do not see abstention as its logical entailment. The Board's position sweeps too broadly; if followed, it would displace federal jurisdiction over all challenges to state educational regulation. As then Chief Judge Swygert of the Seventh Circuit noted in an analogous vein, "The fact that the alleged denial of constitutional rights is set in the context of the public education system cannot be determinative."[7] *Burford* abstention rests on additional concerns beyond the mere presence of an important state administrative regime, concerns not present here.

The salient feature in *Burford* was that, in addition to extensive state regulation of a field, "the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields" by concentrating judicial oversight in

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[7]*Drexler v. Southwest Dubois School Corporation*, 504 F.2d 836, 840 (7 Cir. 1974) (in banc). Even a partial listing of cases in which federal jurisdiction was exercised over § 1983 challenges to state educational regulation of private schools would be lengthy. *See, e.g., New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey Board of Higher Education*, 654 F.2d 868 (3 Cir. 1981); *Yellow Springs Exempted Village School District Board of Educ. v. Ohio High School Athletic Assoc.*, 647 F.2d 651 (6 Cir. 1981) (state regulation of public and private secondary school athletics); *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1 Cir. 1979); *Marlboro Corp. v. Assoc. of Independent Colleges and Schools, Inc.*, 556 F.2d 78 (1 Cir. 1977); *Milwaukee Montessori School v. Percy*, 473 F. Supp. 1358 (E.D. Wis. 1979); *cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state compulsory school-attendance statute challenged); *Rivera v. Marcus*, 696 F.2d 1016 (2 Cir. 1982) (state regulation of private foster care).

specially authorized state courts. *Colorado River Water Conservation District, supra*, 424 U.S. at 815. Review by a federal court — or, indeed, by any unspecialized state court — of the administrative actions questioned in *Burford* "would have had an impermissibly disruptive effect on state policy for the management of those fields." *Id.* The premise underlying the *Burford* doctrine is that the very act of review by a court other than the one purposely made familiar with the particularly complex resource regulation issues involved would upset a carefully crafted and integrated state system. *See Alabama Pub. Serv. Comm. v. Southern Railway*, 341 U.S. 341 (1951); *Colorado River Water Conservation District, supra*, 424 U.S. at 814-16; *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 376-77 (9 Cir. 1982).

Here, by contrast, the Maryland state courts do not stand in any special relationship of technical oversight or concentrated review to the educational certification process the way the Texas or Alabama resource review courts did in *Burford* and *Alabama PSC*. Once having completed the administrative process, Havis had the opportunity to bring his constitutional challenges in state court under Maryland's Administrative Procedure Act[8]; he chose instead to file his complaint in federal court. An adjudication that the Board's actions were unconstitutional in any of the ways claimed by Havis will be equally disruptive of the regulatory scheme challenged whether the decision emanates from a federal or a state court. *Cf. Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978). Federal court adjudication cannot intrusively displace that by a state court acting as "an integral part of the regulatory process", *Alabama PSC, supra*, 341 U.S. at 348, because no such court exists in Maryland. *See* Field, Abstention in Constitutional Cases:

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[8]*See* §12-206(d)(1), Ann. Code of Md., Education (1978). Exhaustion of administrative remedies, of course, is not a prerequisite to the maintenance of a § 1983 action. *Patsy v. Board of Regents of the State of Florida*, _____ U.S. _____, 102 S. Ct. 2557, 73 L. Ed.2d 172 (1982).

The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1156 (1974). Dismissal of Havis's suit under the *Burford* rationale was therefore improper.[9]

The Board also suggests that in addition to the *Burford* doctrine, abstention follows here on the strength of our decision in *AFA Distributing Co., Inc. v. Pearl Brewing Co.*, 470 F.2d 1210 (4 Cir. 1973). Unlike the case before us, however, *Pearl Brewing* involved an "exceedingly difficult and incredibly ambiguous statute" regulating the distribution and sale of alcoholic beverages. *Id.* at 1211. That statute was "recently enacted" and susceptible to multiple interpretations; which view the state courts would choose was in doubt, as the statute had never been interpreted and lacked even a guiding history of administrative application. Moreover, dismissal of an action on abstention grounds was influenced by the fact that no federal question was pled in that diversity case. Rather, a federal question was only "lurking within the statute . . . as a defense contention." *Id.* at 1214.

All of the elements converging in *Pearl Brewing* to prompt dismissal are in reality the opposite of those present here, where we face a statute first enacted in similar form some thirty-six years

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[9]The district court also supported its dismissal by reference to *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), but the narrow *Thibodaux* doctrine has no application here. *Thibodaux* is generally understood as resting on the special nature of eminent domain as a peculiarly local concern, although by any measure the case is something of an anomaly. *See* C. Wright, Law of Federal Courts 309-310 (4th ed. 1983); Field, Abstention in Constitutional Cases, *supra*, at 1150; *Crawford v. Courtney*, 451 F.2d 489, 492 (4 Cir. 1971). For the same reasons, abstention here is not supported by *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455 (D. Md. 1978), another eminent domain case urged upon us by the Board to justify dismissal of Havis's suit. Even were the *Thibodaux* doctrine to suggest some form of abstention, by that case's own terms federal jurisdiction is retained but merely postponed pending resolution of an unclear state law issue. 360 U.S. at 29; *see also, Fralin & Waldron, Inc. v. City of Martinsville, Virginia*, 493 F.2d 481 (4 Cir. 1974).

ago, the language of which has been upheld by the state's highest court,[10] which carries a long history of authoritative administrative construction, and which is challenged on constitutional grounds. This is not among the "relatively rare instances" contemplated by *Pearl Brewing* as a proper case for abstention.

B. *Pullman* Abstention

The Board alternatively asks for affirmance of the district court's ruling that *Pullman*-type abstention would be appropriate in this case. To apply the *Pullman* doctrine, at a minimum it must appear that there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is "potentially dispositive". *Donohoe Construction Co., Inc. v. Montgomery County Council*, 567 F.2d 603, 607 (4 Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); *Cox, supra*, 669 F.2d at 942. In this case, however, the only state law questions suggested as unclear by the Board are ones either not in issue or in effect duplicative of the constitutional claims alleged by Havis.

The Board argues that an "unsettled" question is presented by the possibility that a state court hearing this matter might rule that the definitions of "noncollegiate educational institution" found in §2-206 or "institution of postsecondary education" in §12-201 of the Maryland Education Article do not apply to Havis's schools. Yet the Board throughout has treated Havis's schools as within those sections, and Havis has conceded that his tutoring school and teacher training center meet the statutory definitions of §§2-206 and 12-201 and thereby are subject to the attendant certification requirements, if valid. In short, there is no one litigating the issue which the Board suggests might somehow be found unclear. As

[10]*See, infra*, at text accompanying note 11.

we said in *Donohoe Construction, supra,* 567 F.2d at 607, "It is obvious that where no issue of state law exists, the federal constitutional issue cannot be avoided by 'a definitive ruling on the state issue . . .' "

As part of its rationale for finding *Pullman* abstention appropriate, the district court looked to a different state law matter, equating an "unsettled issue" of state law with one supposedly not yet squarely presented to a state court. The court's view was that because Havis in part challenges the certification scheme as applied to him on "vagueness" grounds, there is the potential for a state court to give a narrowing construction to the statutory grant empowering the State Board for Higher Education to consider the "educational qualifications and standards" of an applicant. §12-203(b). But challenges to state statutes on "vagueness" grounds are really of two varieties, with abstention permissible only where "the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct." *Procunier v. Martinez,* 416 U.S. 396, 401 n.5 (1974); *see also Public Citizen Health Research Group v. Commission on Medical Discipline of Maryland,* 573 F.2d 863 (4 Cir. 1978) (abstention warranted pending state court interpretation of whether undefined statutory term "advertise" encompassed activity at issue). As already noted, there is no challenge in this case to the applicability of the implicated state statutes to Havis's activities.

The other variety of "vagueness" challenge is that present here, one in which it is the degree of discretionary authority vested in the administering state official by the empowering statute that assertedly violates due process. "In such a case no single adjudication by a state court could eliminate constitutional difficulty. Rather, it would require 'extensive adjudications, under the impact of a variety of factual situations,' to bring the challenged statute of regulation 'within the bounds of permissible constitutional certainty.' " *Procunier, supra,* 416 U.S. at 401 n.5 (citations omitted). No single interpretation of the statutory language

questioned by Havis could conceivably narrow the Board's criteria in evaluating the applicant's "educational qualifications and standards" to the point where the constitutional issue, whatever its merits, could be avoided.

Moreover, the state courts cannot be expected to undertake any such course of discretion-narrowing interpretation. The Maryland Court of Appeals has already held the virtually identical language in the precursor statute to §12-201 to be sufficiently definite and unambiguous to permit it to stand as proper legislative guidance to the State Board for Higher Education. *Schneider v. Pullen*, 198 Md. 64, 81 A.2d 226 (1951). In *Schneider*, a barber challenged the language about which Havis complains as an unlawful delegation of legislative power "because it provides no definite standards by which the State Superintendent of Schools is to be guided in issuing his regulations and in granting permits." The Court of Appeals rejected the argument and approved the reasonableness of the broad language given the purpose of the statute:

> To cover all types of trade schools, as well as other educational institutions, there could be no one set of standards prescribed, but that need not invalidate the delegation of power if the general standards, broad though they may be, are sufficiently explicit to limit the State Superintendent of Schools in his actions, and not permit him to exercise arbitrary power. The wording, already quoted, from subsection (b) is that the schools must have conditions of entrance, scholarship, educational qualifications, standards and facilities adequate and appropriate for the purposes, program, training, and courses to be taught.

* * *

> We think the standards prescribed for so broad a subject are sufficiently definite for us to hold that the statute is not subject to constitutional objection on this ground.

81 A.2d at 229. In light of *Schneider*, there is no state law basis for deciding this case that avoids the federal constitutional issue raised.[11] *Pullman* abstention therefore also was improper.

III.

Citing the requirement of Rule 12(a), F.R. Civ. P., that the defendant "shall serve his answer within 20 days after the service of the summons and complaint upon him", Havis argues that the Board was in default because no "answer" was served as of the

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[11]There is certainly no ambiguity in the statutory exemption from certification requirements of religious schools, §2-206(e)(4), which Havis also challenges. The situation as to this section is thus like that addressed in *Harman v. Forssenius*, 380 U.S. 528, 535 (1965), where the Supreme Court stated: "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." (citation omitted) Moreover, even if the Board's statutory discretion in the evaluation of Havis's educational qualifications and standards could be narrowed and the attendant constitutional issue thereby avoided through a state court adjudication, the constitutionality of this religious exemption could not, and a constitutional issue central to this case would remain. As the Supreme Court stated in rejecting a belated proffer of a state law issue as "unsettled", "abstention would be pointless" where "the state issues put forward . . . are plainly insufficient to merit such treatment." *Mayor v. Educational Equality League*, 415 U.S. 605, 628 (1974).

time he moved for default judgment roughly 40 days after service of the summons and complaint.[12] The Board responds by noting the extensive discovery requests that accompanied service of the complaint and motion for preliminary injunction, as well as by pointing out that its response in opposition to the motion for preliminary injunction set forth most of its defense so that it was tantamount to the answer required by the Rules.

We need not here depart from the general rule that a motion or a response to one is not deemed a "responsive pleading" for the purposes of the time limits set out in the Rules.[13] *See generally* 5 Wright & Miller, Federal Practice and Procedure: Civil § 1348, pp. 536-37 (1969); *cf. Atlantic Steamers Supply Co. v. International Maritime Supplies Co., Ltd.*, 268 F. Supp. 1009, 1011 (S.D.N.Y. 1967) (defendant's time allotted for service of responsive pleading extended only by making of motion under Rule 12). For, even had the district court granted Havis's motion, under

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[12]Havis filed his complaint with the district court on September 28, 1981, and contemporaneously filed his motion for a preliminary injunction. On October 19, 1981, the Board filed a response in opposition to the preliminary injunction motion, but did not file anything styled as an answer. On November 9, 1981, Havis moved for default judgment. The motion was denied the next day.

Although Havis provided the district court with postal return receipts for all defendants stamped no later than October 3, 1981, the court noted that its denial of the motion for default judgment was "for failure to prove service." However, Rule 55(a) permits proof of a party's failure to plead or defend to be "made to appear by affidavit or otherwise". In addition to the postal receipts, the Board's own response to Havis's preliminary injunction motion was filed on October 19, showing that the Board had been served more than 20 days prior to the motion for default judgment. We will therefore assume that Havis had properly proven that service had occurred more than 20 days before he moved for default judgment on November 9.

[13]Of course, Rule 12 permits certain defenses to be asserted by motion, which alters the time for filing an answer.

our standard for striking a default judgment the district court here would have been virtually compelled to do so upon a Rule 60(b) motion by the Board. *See United States v. Moradi*, 673 F.2d 725, 727 (4 Cir. 1982). We therefore find no abuse of discretion in the denial of the motion for default judgment.

IV.

Finally, Havis contends that we should direct the district court to grant plaintiffs a preliminary injunction to prevent defendants from enforcing the Maryland statutes against them. Despite having developed a fairly extensive record at the preliminary injunction hearing and other proceedings, the district court never ruled on the merits of Havis's preliminary injunction motion. Instead, the district court found "that the abstention issue raised by the defendants is dispositive" and dismissed the action. We thus lack any written findings of fact and conclusions of law to review, *see* Rule 52(a), F.R. Civ. P., and so have no basis upon which to consider the merits of the motion. In reversing the district court's decision to abstain, we express no opinion on the substantive issues raised by Havis. Those should be decided by the district court in the first instance.

AFFIRMED IN PART

REVERSED IN PART.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED: NOVEMBER 15, 1984

EDUCATIONAL SERVICES, INC., ETC., ET AL.,	)	
Plaintiffs	)	
v.	)	Civil No.
	)	HAR-81-2474
MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL.,	)	
Defendants.	)	

Lee Havis, of Silver Spring, Maryland, for Defendant Educational Services, Inc. and Pro Se.

Stephen H. Sachs, Attorney General of Maryland, James J. Mingle, William A. Kahn, Susan B. Blum, and Susan J. Mathias, Assistant Attorneys General, Baltimore, Maryland, for Defendants

SMALKIN, Magistrate

The plaintiffs, Educational Services, Inc. and Lee Havis,[1] instituted this action on September 28, 1981, pursuant to 42 U.S.C. § 1983, against several defendants including the Maryland State Board for Higher Education (SBHE or Board).[2] In seeking declaratory and monetary relief, plaintiff alleges the deprivation of his first and fourteenth amendment rights by reason of defendant's refusal to certify plaintiff's proposed Montessori teacher training program. In conjunction with the complaint, plaintiff has also filed a motion for a preliminary injunction seeking the suspension of the Board's certification regulations pending the outcome of the instant case. For its part, defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Inasmuch as defendant's motion and plaintiff's reply to that motion incorporate by reference matters outside the pleadings, the Court has chosen to address the motion

[1]Educational Services, Inc., a tax exempt nonprofit Maryland corporation, does business in Maryland under the name International Montessori Society. Lee Havis, an attorney, is the executive director of International Montessori Society. Additionally, Havis owns and operates Capital Tutoring, a private tutoring school located in Maryland. Because of the identity of interests between plaintiffs, they will collectively be referred to as plaintiff.

[2]Plaintiff named as defendants Maryland State Board for Higher Education, its seven members in their official capacities, the Commissioner of the SBHE and several staff members, the Maryland State Board of Education (SBE), and the Superintendent of Schools. The defendants will be collectively referred to as defendant or "Board" except where reference is specifically made to the State Board of Education.

to dismiss as a motion for summary judgment[3] under the authority of Rule 12(b). Plaintiff has also filed his own motion for summary judgment. Having carefully examined the papers filed in connection with the motions for summary judgment and the motion

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[3]Rule 12(b) of the Federal Rules of Civil Procedure provides that if, upon a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and accepted by the Court, the Court shall treat the motion as one for summary judgment under Rule 56.

In the present case, defendants' brief accompanying the motion to dismiss is replete with references to plaintiff's affidavit accompanying his motion for a preliminary injunction. Thus, defendant's motion incorporates by reference plaintiff's affidavit and indicates to this Court that defendant accepts the material facts as presented by plaintiff. Additionally, plaintiff's brief in opposition to defendant's motion to dismiss contains several references to the testimony of several defendants elicited in a hearing held before Judge Howard of this Court in November 1981. Finally, plaintiff submitted several exhibits in connection with his complaint and motion for a preliminary injunction which have been incorporated by reference into plaintiff's brief in opposition to defendant's motion.

The Court finds that the annexed material, including plaintiff's affidavit, plaintiff's exhibits and the hearing transcript, represents sufficient matters outside the pleadings to warrant a conversion of defendant's motion to dismiss into a motion for summary judgment. *See Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 390-91, *reh'g denied*, (7th Cir. 1981); *Bradford v. School District No. 20*, 364 F.2d 185, 187 (4th Cir. 1966). Moreover, under Rules 12(b) and 56, a motion for summary judgment is particularly appropriate in that the annexed materials clearly indicate that as to the material facts there is no genuine controversy between the litigants. *See Smoot v. State Farm Mutual Automobile Insurance Company*, 299 F.2d 525, 528 (5th Cir. 1962); *Hughes v. Werner's Estate*, 78 F.Supp. 762, 766-67 (S.D. Ill. 1948).

In accordance with Rule 12(b), the Court provided both parties with notice of the conversion to a motion for summary judgment and an opportunity to file additional materials in support of or in opposition to the motion. Plaintiff took this opportunity to file his own motion for summary judgment.

In order to prevail on a motion for summary judgment, the moving party must establish as a matter of law that he is entitled to judgment on the claim. *See Lemberos v. Laurel Racecourse, Inc.*, 489 F.Supp. 1376, 1380 (D. Md. 1980).

for a preliminary injunction, the Court concludes that a hearing is not necessary to rule on the motions.[4] Local Rule 6.

I.

The material facts in this case are not in dispute. In February 1980, plaintiff submitted an application to the Board for a certificate of approval for a Montessori teacher training program to be operated under the name International Montessori Society (IMS). The application was erroneously submitted under the regulations governing "collegiate type" institutions, and was subsequently rejected for failure to satisfy the minimum standards applicable to these institutions. (Plaintiff's Affidavit ¶ 7.) Plaintiff then resubmitted his application under the regulations governing private post secondary proprietary schools. MD. ADMIN. CODE tit. 13B, §§ .01.01 - .09 (1983). Pursuant to Board practice, plaintiff's application, including a proposed curriculum, was sent to qualified persons outside the Board for review and evaluation. The curriculum was evaluated by five qualified persons within the education field including three persons associated with Montessori

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[4] "When one or both parties support or oppose the preliminary injunction application on written evidence, if there is no conflict about the facts, the preliminary injunction will be granted or denied on the basis of the undisputed evidence." 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2949 at 474 (1973). In such cases, a court may dispense with a hearing on the preliminary injunction. *See Spartacus Youth League v. Board of Trustees of the Illinois Industrial University*, 502 F.Supp. 789, 805 (N.D. Ill. 1980).

In the present case, there is no dispute as to the material facts. Both parties agree as to events surrounding the Board's denial of plaintiff's application for certification. The only question before the Court is a question of law regarding the constitutionality of the challenged statutes. Accordingly, the Court finds this to be a particularly appropriate case in which to dispense with a hearing and decide the motion for a preliminary injunction solely on the materials submitted by both parties.

educational programs. All five evaluators found numerous deficiencies in plaintiff's proposed training program and recommended that the program not be approved. Accordingly, on June 13, 1980, the Board sent plaintiff a letter informing him that his IMS program would not be approved at that time. Also included with the letter was a detailed evaluation outlining the deficiencies in plaintiff's program.[5] The letter further indicated that a Board official would be available to assist plaintiff in correcting the enumerated deficiencies. On August 15, 1980, plaintiff requested that the Board revise its accreditation standards to enable schools offering unique educational programs to obtain certification. The Board rejected this request on October 2, 1980. (Plaintiff's Affidavit ¶¶ 20 & 21.) Plaintiff was again notified on November 9, 1980 that the program deficiencies remained and that an unfavorable staff recommendation would be forthcoming unless they were corrected. (Plaintiff's Affidavit ¶ 23.) Thereafter, in December 1980, plaintiff met with defendant Rogers and several SBHE staff members to discuss revision of the curriculum to enable a favorable evaluation. On December 29, 1980, plaintiff resubmitted his revised application and curriculum to the Board. Plaintiff was subsequently informed that the deficiencies in the program continued to exist. Thereafter, plaintiff requested a review of the decision at the February 11, 1981 meeting of the Advisory Postsecondary School Approval Committee (APSAC).[6] At that meeting, APSAC

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[5]The deficiencies included (1) inconsistent and incomplete entrance requirements; (2) lack of any overall evaluation process to determine whether a student has achieved the objectives of the program; (3) lack of a substantive evaluation process; (4) too much emphasis on self-study; (5) curriculum lacked instruction in certain areas and was inadequate in others; and (6) inconsistent graduation requirements. (Plaintiff's Exhibit H.)

[6]When the SBHE receives an application for approval of a proposed school, it forwards the materials submitted in support of the application to outside reviewers for evaluation. Additionally, the application is submitted to the Advisory Postsecondary School Approval Committee (APSAC) for its consideration. APSAC is composed of state-employed professional educators and (Continued)

recommended that plaintiff's program be submitted to additional outside reviewers for further evaluation. (Plaintiff's Exhibit G.) The program was then sent to eight additional evaluators[7] together with a cover letter from defendant Baseman in which he indicated that the program had previously been submitted to five reviewers, all of whom had recommended that it not be approved. (Plaintiff's Exhibit F.) Of the eight additional evaluators, only one recommended approval of plaintiff's program,[8] while the remaining seven reviewers advised that it not be approved. (Plaintiff's Exhibit F.) Accordingly, on April 15, 1981, defendant Sheldon H. Knorr, Commissioner of Higher Education, informed plaintiff that upon the recommendations of the Board and APSAC, his application to operate the IMS program was denied. Plaintiff was informed that the evaluators and Board staff members had concluded that the proposed curriculum "[did] not meet the present prevailing standards of quality for a Teacher Training Program." (Plaintiff's Exhibit D.) Commissioner Knorr

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representatives of various approved proprietary schools. The SBHE and APSAC both forward their recommendations to the Commissioner who makes the final decision regarding approval or denial of the application.

[7]Although the curriculum was forwarded to eight additional evaluators, two of these reviewers had previously evaluated plaintiff's application in connection with the first round of evaluations. Dr. Evelyn DiTosta, Chief, Teacher Education Branch, Maryland State Department of Education, and Monica Sparben, Specialist in Accreditation, Nonpublic School Accreditation Branch, Maryland State Department of Education, each reviewed plaintiff's curriculum during the first and second submission and both recommended it not be approved on both occasions.

[8]The lone evaluator recommending approval was Dr. John Yawkey, Early Childhood Faculty, Pennsylvania State University. Dr. Yawkey had been recommended by plaintiff to review the curriculum. (Plaintiff's Exhibit F.)

offered the assistance of the Independent Postsecondary School staff in helping plaintiff correct the remaining deficiencies.[9]

On April 24, 1981, pursuant to Maryland law, plaintiff requested a hearing before the SBHE to review the denial of his application. MD. EDUC. CODE ANN. § 12-203(c) (1982 Cum. Supp.) On July 2, 1981, the SBHE conducted a hearing at which both sides presented evidence and testimony regarding the denial of plaintiff's application and the procedures attendant to such denial. Following the hearing, the Board voted seven to one to deny the certificate of approval for plaintiff's teacher training program. Plaintiff was so informed by letter on July 10, 1981.

On September 28, 1981, plaintiff brought this suit against the SBHE and several other defendants seeking a declaratory judgment that sections 2-206 and 12-201 to 12-207 of the Maryland Educational Code were unconstitutional. Plaintiff also sought a preliminary and permanent injunction against defendant's enforcement of these statutes as well as monetary damages.[10] On January 6, 1982, Judge Howard of this Court abstained from deciding the case. On appeal, the Court of Appeals for the Fourth Circuit concluded that abstention was unwarranted under the facts of the case.

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[9]On April 27, 1981, Commissioner Knorr wrote a follow up to his letter of April 15, in which he provided a detailed list of the deficiencies existing in the curriculum for plaintiff's proposed teacher training program. (Plaintiff's Exhibit B.) Many of the deficiencies were identical to those identified after the first submission to the evaluators. (Plaintiff's Exhibit H.) Commissioner Knorr also repeated his offer of assistance in correcting the enumerated deficiencies.

[10]Plaintiff has not sought, nor could he seek, a review of the SBHE decision in this Court. The procedure for judicial review of SBHE decisions is outlined in MD. EDUC. CODE ANN. § 12-206 (1978). Therefore, the proper forum for such a review is the state judicial system, not the federal courts. It is not the function of this Court to second guess SBHE decisions. Accordingly, this Court draws no conclusions as the propriety of the SBHE decision denying certification to plaintiff's program.

Educational Services, Inc. v. Maryland State Board of Education, 710 F.2d 170 (4th Cir. 1983). The court of appeals reversed the district court insofar as the abstention issue was concerned and remanded the case to this Court for a decision on the issues raised in the pleadings. The case is now before this Court on plaintiff's motions for a preliminary injunction and for summary judgment and defendant's motion to dismiss which, as previously noted, has been converted to a motion for summary judgment.

II.

Section 1983 provides in pertinent part:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> 42 U.S.C. § 1983 (1982).

Two elements are essential to maintain a cause of action under section 1983. First, plaintiff must allege and prove that he "suffered deprivation of a right secured by the Constitution and laws of the United States; and second, this deprivation must be the result of action taken by the defendant "under color of law." *Johnson v. Capitol City Lodge No. 74, Fraternal Order of Police*, 477 F.2d 601, 602 (4th Cir. 1973); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *District 28, United Mine Workers v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979); *Van Horn v. Lukhard*, 392 F.Supp. 384, 386 (E.D. Va. 1975).

In the instant case, it is undisputed that the defendants acted under color of state law. The Maryland State Board for Higher Education and the Maryland State Board of Education are both administrative bodies of the state expressly created by state law. MD. EDUC. CODE ANN. §§ 2-201 & 12-101 (1978). Both boards fulfill their responsibilities pursuant to state law. Therefore, actions taken by the Boards are actions taken under color of state law. Similarly, each of the individual Board members named as defendants in the instant action was appointed to his or her posts in accordance with state law. MD. EDUC. CODE ANN. §§ 2-202 & 12-102 (1978). Their duties and responsibilities are set forth in the state statute together with guidelines and procedures for fulfilling those responsibilities. Thus, the actions of the individual defendants in their capacity as Board members are actions taken under color of state law. Moreover, defendants do not seriously dispute the fact that their actions were taken under color of law. The Court therefore concludes that plaintiff has adequately established the second element of a successful claim under section 1983.

In an effort to satisfy the first element regarding the deprivation of rights secured by the Constitution or laws of the United States, plaintiff invokes a myriad of constitutional "buzz words" in a rather poorly drawn complaint. Fortunately, this Court is not without guidance in deciphering the complaint because the Fourth Circuit previously reduced plaintiff's complaint to two principal theories of unconstitutional action.

> Plaintiff's principal claim is that the certification powers delegated to the Board under §§ 12-201 *et seq.*, Ann. Code of Maryland, Education (1982 Cum. Supp.), permit the Board unconstrained discretion to deny certification to unconventional or controversial applicants. Havis's second major contention is that the statutory

> exemption for religious nonpublic "noncollegiate educational" institutions found in § 2-206(e)(4) of the Education Article violates the Establishment Clause because secular non-public schools such as Capital Tutoring remain fully subject to Board certification.

710 F.2d at 171-72 (footnotes omitted).

Unlawful Delegation of Power

Plaintiff's principal claim is that sections 12-201 *et seq.* of the Maryland Education Code represent an unlawful delegation of power to the SBHE in that there are no adequate guidelines or standards under which the Board is to exercise the delegated power.[11] Such a standardless approach, plaintiff argues, permits the Board unconstrained discretion to arbitrarily grant or deny certificates of approval.

It is well settled that a state has the power to establish reasonable regulations regarding the operation of educational institutions. *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 245-46 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). Equally well settled is the proposition that legislative

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[11]In particular, plaintiff objects to § 12-203(b) which provides:

> (b) *Issuance* — The State Board for Higher Education shall issue a certificate of approval to an institution of postsecondary education if it finds that the facilities, conditions of entrance and scholarship, and educational qualifications and standards are adequate and appropriate for:
>
> (1) The purposes of the institution; and
>
> (2) The programs, training, and courses to be offered by the institution.

MD. EDUC. CODE ANN. § 12-203(b) (1982 Cum Supp.) Plaintiff asserts that the language "educational qualifications and standards" is so vague and subjective that the entire statute is an unlawful delegation of power. *See Educational Services, Inc. v. Maryland State Board for Higher Education*, 710 F.2d 170, 171 & n.3 (4th Cir. 1983).

bodies may lawfully delegate their power to administrative agencies. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2 at 150-51 (2d ed. 1978). Considering the complexity of the responsibilities undertaken by governmental bodies in the United States, the delegation of some of these responsibilities is essential to the effective operation of government. *See United States v. Robel*, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring in result); 1 K. DAVIS, *supra* at 150-51. It is quite obvious, therefore, that state legislatures invested with the power to regulate schools may (and, indeed, must as a practical matter) delegate that power to administrative agencies, including state boards of education. The only limitation on this delgation is that the legislative body must establish adequate standards to guide the exercise of the delegated powers. *See* 1 K. DAVIS, *supra* at 151. However, courts have generally construed this requirement very liberally, to the point where some commentators argue that it is no longer a condition upon the lawful delegation of power. *Id.* Indeed, "[t]he modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases." *Pressman v. Barnes*, 209 Md. 544, 555, 121 A.2d 816, 822 (1956); *see also Lemberos v. Laurel Racecourse, Inc.*, 489 F.Supp. 1376, 1390 (D. Md. 1980) (*quoting Pressman*).

Applying the foregoing principles to the Maryland statute complained of in the instant action, this Court concludes that the standards governing the certification of schools by the SBHE are sufficiently definite to withstand plaintiff's constitutional challenge. To this end, the Court believes that the case of *Schneider v. Pullen*, 198 Md. 64, 81 A.2d 226 (1951), interpreting the predecessor to section 12-203, is particularly applicable.[12] Therein the Court of

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[12]In *Schneider*, the plaintiff challenged the education statute as an unlawful delegation of a legislative function because it lacked any standards to guide

(Continued)

Appeals of Maryland reasoned:

> To cover all types of trade schools, as well as other educational institutions, there could be no one set of standards prescribed, but that need not invalidate the delegation of power if the general standards, broad though they may be, are sufficiently explicit to limit the State Superintendent of Schools in his actions, and not permit him to exercise arbitrary power. . . . [T]he standards prescribed for so broad a subject are sufficiently definite for us to hold that the statute is not subject to constitutional objection on this ground.

198 Md. at 69-70.

While federal courts are not constrained to abide by the decisions of a state court in federal question cases, this Court nevertheless chooses to accord *Schneider* great weight because it represents a pronouncement by Maryland's highest court regarding the interpretation of a Maryland statute. Moreover, the reasoning of the Schneider court in favor of less stringent standards is equally valid today, especially in light of the recent proliferation of alternative methods of education. A more rigid set of standards

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the State Superintendent of Schools in granting or denying permits. Section 14A(b) provided:

> The State Superintendent of Schools shall issue a certificate of approval to any applicant operating or proposing to operate such a private school or educational institution whose conditions of entrance, scholarship, *educational qualifications, standards* and facilities are adequate and appropriate for the purposes, program, training and courses to be taught or given therein.

MD. EDUC. CODE ANN. art. 77 § 14A(b) (1947) (emphasis added). Plaintiff maintained that this section violated both the Maryland Declaration of Rights and the Constitution of the United States. 198 Md. at 67, 81 A.2d at 228.

would most certainly have precluded approval of many of the more progressive educational programs existing today.[13]

Further support for the constitutionality of section 12-203 can be found in its comprehensive provisions for administrative and judicial review of the Board's decision. MD. EDUC. CODE ANN. § 12-206 (1978). These provisions represent adequate safeguards against wholly arbitrary decisions of the Board. *See Lemberos v. Laurel Racecourse, Inc.*, 489 F.Supp. 1376, 1389 (D. Md. 1980).[14] Accordingly, the Court finds that the standards set forth in section 12-203 are not so indefinite as to invest the SBHE with uncontrolled discretion to deny certification to unconventional or

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[13]It is at least unusual and, at most, disingenuous that plaintiff would argue in favor of a more definite set of standards, at the same time maintaining that the proposed IMS curriculum "is unique in application and approach, outside the normally accepted standards and content of otherwise comparable or traditional curricula." (Complaint ¶ 16.) Indeed, a more rigid set of standards would most certainly have prevented plaintiff's "unique" program from obtaining state certification. As it was, plaintiff could not obtain approval under the flexible standards set forth in § 12-203.

Further, plaintiff's reference to "normally accepted standards" implies that while the statute does not specifically enunciate a definitive set of standards, certain recognized standards have nevertheless developed within the educational community. Even if this is not the case, the Court is convinced that the statutory standards are sufficient to uphold its constitutionality.

[14]To the extent plaintiff's complaint also alleges a denial of procedural due process in the certification procedure, the Court finds this assertion without merit. The procedures outlined in § 12-203 adequately protect any interest plaintiff may have in operating a teacher training program. Plaintiff's program was reviewed by 13 evaluators, 12 of whom recommended denial of plaintiff's application. SBHE staff members met with plaintiff in an effort to assist in correcting the program deficiencies. Plaintiff was afforded a fair and unbiased hearing before the SBHE at which he introduced evidence and testimony in support of his training program. Additionally, plaintiff had the option, which he did not pursue, of seeking judicial review of the SBHE decision. Clearly, this comprehensive review procedure accorded plaintiff all the due process necessary to withstand his constitutional challenge.

controversial applicants. On the contrary, the flexible standards embodied in the statute actually facilitate the certification of a wide diversity of educational programs.

Violation of the Establishment Clause

Plaintiff's second allegation regarding the deprivation of his constitutional rights concerns the statutory exemption for religious nonpublic, noncollegiate educational institutions contained in MD. EDUC. CODE ANN. § 2-206(e)(4). Plaintiff essentially argues that the statutory classification has the practical effect of aiding in the establishment of religion, in violation of the establishment clause of the first amendment, which is made applicable to the states through the fourteenth amendment. *See Everson v. Board of Education*, 330 U.S. 1, 5 (1947). Plaintiff reasons that the exemption has a beneficial impact on schools sponsored by bona fide church organizations, in that they do not have to comply with various SBE regulations while secular nonpublic schools such as Capital Tutoring remain fully subject to Board certification. Plaintiff maintains that "exempted schools are placed in a superior and favored position which most definitely affords an advancement of the religious doctrine which these schools espouse."[15]

Defendant strenuously denies that the exemption aids or promotes religion, but argues alternatively that if this were the case

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[15]Although somewhat obtuse in alleging what has befallen him, inasmuch as Capital Tutoring appears to enjoy currently valid state certification, Havis points out that the regulations pursuant to § 2-206 require *inter alia*, that teachers "in schools adhering to the Montessori philosophy" shall have both an accredited bachelor's degree and "a Montessori diploma" from a state accredited teacher training institution. C.M.R. § 13A. 09.09.05(c)(2). Havis alleges that he is thereby prevented from using teachers trained in his proposed IMS training school in his tutoring school, whereas were he to operate a religious tutoring school he would be exempt from state oversight of his teachers' qualifications.

710 F.2d at 172 n. 4. It is this alleged injury which gives plaintiff standing to challenge the religious exemption.

the state has a compelling reason for the exemption. In particular, defendant maintains that the inclusion of religious schools under the certification regulations would unconstitutionally impinge upon their freedom of religion and would excessively entangle the state in church affairs.

Thus, this case presents an interesting issue regarding the interplay of the two religion clauses of the first amendment. In this respect, the case is similar to the recent Fourth Circuit opinion in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984). In that case, the plaintiffs challenged a Virginia statute which exempted from state regulation those child care centers operated by religious institutions. As in the instant case, the *Forest Hills* plaintiffs argued that the exemption had the effect of aiding and promoting religion in violation of the first amendment. The defendant argued that inclusion of religiously affiliated child care centers in the regulatory framework would unconstitutionally impinge upon their right to freedom of religion. Defendant maintained that under the standards for assessing an establishment clause enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971),[16] the secular legislative purpose of the exemption is the "constitutionally compelled or permitted accommodation it makes to the free exercise rights of the exempted institutions." *Forest Hills, supra* at 238. The court concluded that "under the establishment clause, the challenged exemption is facially overbroad as a permissible accommodation to any free exercise rights of the sectarian operators of child care centers." *Id.* at 233. The court found that the defendant had failed to adequately establish any burden upon free exercise rights imposed by inclusion of

[16]There are three inquiries to be made in examining a statute for a violation of the establishment clause of the first amendment. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted).

religious child care centers under the regulatory scheme. *Id.* at 242-44. However, rather than grant summary judgment to the plaintiffs, the court remanded the case in order to permit religious organizations covered by the exemption an opportunity to intervene in the action to establish the existence of any free exercise rights which would be unconstitutionally burdened by the regulations. *Id.* at 245-46. If these institutions did not intervene, the district court was instructed to enter summary judgment in favor of the plaintiffs.

Upon first glance, the instant case and *Forest Hills* appear factually similar, thereby necessitating a similar finding that the exemption afforded religious institutions under the Maryland statute is unconstitutionally overbroad. However, one critical distinction exists between the cases, which makes *Forest Hills* inapposite to the case at bar. In *Forest Hills*, plaintiff sought a declaration that the *exemption* was unconstitutional, and a preliminary injunction *compelling application* of the regulation to all child care centers irrespective of religious affiliation. *Forest Hills, supra* at 233 n. 2. In the present case, plaintiff seeks a declaration that the *entire statute* is unconstitutional and a preliminary injunction *prohibiting the enforcement* of the *statute* against religious and nonreligious institutions. Thus, plaintiff asks this Court to declare the entirety of section 2-206 unconstitutional despite the fact that he specifically calls into question only section 2-206(e)(4). It is well settled that the

> unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). *See also Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*quoting Champlin*); *McCorkle v. United States*, 559 F.2d 1258,

1261 (4th Cir. 1977) (*quoting Champlin*), *cert. denied*, 434 U.S. 1011 (1978). Furthermore, an express legislative pronouncement regarding the severability of a statute discloses an "intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions would have been enacted without regard to [the invalid portions]." *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 235 (1932).

The Maryland legislature has enacted a catch-all severability provision which is contained in MD. ANN. CODE art. 1 § 23 (1981). That section provides:

> [T]he provisions of all statutes enacted after July 1, 1973 are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent.

The Maryland Education Code, including section 2-206, was compiled and revised in 1978.[17] Therefore, although section 2-206 was originally enacted prior to 1973, it nevertheless falls within the purview of the severability provision set forth in article 1 section 23. Moreover, a common sense interpretation of section 2-206 indicates that the Maryland legislature did not intend to entirely discard the certification regulations for all educational institutions if it could not exempt those institutions operated by bona fide church organizations. A more plausible interpretation indicates

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[17]The Act which revised and compiled MD. EDUC. CODE ANN. §§ 1-101 to 26-201 (1978) specifically repealed its predecessor, MD. ANN. CODE art. 77A (1957). *See* 1978 Md. Laws ch. 22, § 1 (effective July 1, 1978).

that if the legislature could not exempt religious institutions it nevertheless intended to regulate all educational institutions including religious schools. Accordingly, this Court concludes that the Maryland legislature intended the provisions of section 2-206 to be completely severable. Inasmuch as the provisions of 2-206 would remain wholly effective absent the exemption contained in 2-206(e)(4), this Court cannot and will not declare the entirety of section 2-206 unconstitutional as requested by plaintiff. As a matter of law, therefore, defendant is entitled to judgment in its favor regarding the constitutionality of section 2-206 as it applies to nonreligious institutions.

Furthermore, the Court will not declare the religious exemption unconstitutional. It is a fundamental principle of American jurisprudence that a court should not decide a constitutional question where it can fairly be avoided by resort to alternative nonconstitutional grounds. *See, e.g., Communist Party v. Catherwood*, 367 U.S. 389, 392 (1961); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). In light of this Court's conclusion that the provisions of section 2-206 are severable, the unconstitutionality of the religious exemption is immaterial to plaintiff's case. The only effect of declaring the exemption unconstitutional would be that educational institutions operated by bona fide church organizations would be subject to state certification. Under no circumstances would such a declaration enable plaintiff to escape the regulatory scheme embodied in section 2-206 as it applies to his nonreligious institution. Accordingly, this Court declines to reach the question of whether the exemption represents an unconstitutional establishment of religion. This question is better left to another case in which the issue is squarely presented and the litigants have a sufficient stake in the outcome of the litigation to aggressively pursue the constitutional issues.[18]

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[18]Because the present case does not adjudicate the constitutionality of the religious exemption, it is unnecessary to allow the case to go to trial to permit

(Continued)

In sum, the Court concludes the flexible standards contained in section 12-203 are adequate to withstand plaintiff's claim of an unlawful delegation of legislative power. Additionally, in light of the severability of the provisions of section 2-206, this Court will not invalidate the regulation of plaintiff's programs regardless of whether the religious exemption is unconstitutional. Therefore, because plaintiff has failed to establish any meritorious deprivations of his constitutional rights, his claim under 42 U.S.C. § 1983 must fail, and as a matter of law, defendant is entitled to judgment in the instant action.

Therefore, I respectfully recommend that, upon the expiring of the time for objection hereto as set forth in Fed.R.Civ.P. 72, an order be entered denying plaintiff's motions for preliminary injunction and summary judgment, granting defendants' motion for summary judgment, and entering summary judgment in favor of the defendants against the plaintiffs, with costs, except the costs of appeal heretofore assessed in favor of plaintiff by the Fourth Circuit.

[signed]

Frederic N. Smalkin
United States Magistrate

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religious organizations to intervene in the action. In this respect, the case is dissimilar to *Forest Hills* where the court permitted intervention, because the decision impacted upon the rights of certain religious organizations not parties to the action. The Court's decision in this case does not affect the rights of religious organizations under the exemption. The exemption remains fully applicable to schools operated by bona fide church organizations. If the constitutionality of the exemption is challenged in a later case, intervention may be appropriate, but in the present case, it is unnecessary.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EDUCATIONAL SERVICES, INC., ETC., ET AL.,	)	
v.	)	CIVIL No.
	)	HAR 81-2474
MARYLAND STATE BOARD FOR HIGHER EDUCATION, ETC., ET AL.,	)	

ORDER

Upon consideration of the Magistrate's Report and Recommendation dated November 15, 1984, and of the objections and responses filed thereto, IT IS, this 18th day of December, 1984, by the Court ORDERED:

1. That the Magistrate's Report and Recommendation BE, and the same IS, ADOPTED *in toto*;

2. That Plaintiff's motion for a preliminary injunction BE, and the same hereby IS, DENIED;

3. That Plaintiff's motion for summary judgment BE, and the same hereby IS, DENIED;

4. That Defendants' motion for summary judgment BE, and the same hereby IS, GRANTED;

5. That summary judgment be entered in favor of defendants and against plaintiffs, with costs, except the costs of appeal heretofore assessed in favor of plaintiff by the Fourth Circuit.

6. That the Clerk mail copies of this Order to counsel for plaintiff and defendants.

[signed]

John R. Hargrove
United States District Judge

APPENDIX G

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT I. (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV. (1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Dec. 29, 1979, P. L. 97-170, § 1, 93 Stat. 1284.)

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(June 25, 1948, c. 646, § 1, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, § 121, 71 stat. 637.)

ANNOTATED CODE OF MARYLAND
EDUCATION TITLE (1985)

§ 2-206. Noncollegiate educational institutions.

(a) *"Noncollegiate educational institution"* defined. — In this section, "noncollegiate educational institution" means a school or other institution that offers an educational program but is not an institution of postsecondary education, as defined in § 12-201 of this article.

* * * * *

(d) *Minimum requirements for issuing certificates and diplomas.* — With the advice of the State Superintendent, the State Board shall establish minimum requirements for issuing certificates and diplomas by public and private noncollegiate educational institutions in this State.

(e) *Certificate of approval.* — (1) A noncollegiate educational institution may not operate in this State without a certificate of approval from the State Board.

(2) The State Board shall issue a certificate of approval to a noncollegiate educational institution if it finds that the facilities, conditions of entrance and scholarship, and educational qualifications and standards are adequate and appropriate for:

(i) The purposes of the institution;

(ii) The programs, training, and courses to be taught by the institution; and

(iii) The certificates and diplomas to be issued by it.

(3) The State Board may not issue a certificate of approval to an institution that practices discrimination based on race, color, or national origin.

(4) This subsection does not apply to an institution operated by a bona fide church organization, including the Amish and Mennonite church parochial schools. However, an institution that does not have a certificate of approval from the State Board may not receive State funds, except that an institution operated by a bona fide church organization is not required to have a certificate to receive State funds for eligible students in the food service program who are enrolled in nursery school through the eighth grade.

* * * * *

Subtitle 2. Certificate of Approval for Institutions of Postsecondary Education.

§ 12.201. "Institution of postsecondary education" defined.

In this subtitle:

(1) "Institution of postsecondary education" means a school or other institution that offers an educational program in this State for individuals who are at least 16 years old and who have graduated from or left elementary or secondary school; and

(2) "Institution of postsecondary education" does not include:

i) Any adult education, evening high school, or high school equivalence program conducted by a public school system of this State; or

(ii) Any apprenticeship or on-the-job training program subject to approval by the Apprenticeship and Training Council. (An. Code 1957, art. 77A § 32A; 1978; ch. 22, § 2.)

§ 12-202. Administration of subtitle; rules and regulations.

(a) *Administration of subtitle.* — The State Board for Higher Education shall administer this subtitle.

(b) *Requirements for issuing certificates, diplomas, and degrees.* — The Board shall establish minimum requirements for issuing certificates, diplomas, and degrees by public and private institutions of postsecondary education in this State. (An. Code 1957, art. 77A, § 32A; 1978, ch. 22, § 2.)

§ 12-203. Certificate of approval.

(a) *Required.* — Except for an institution operating under a charter granted by the General Assembly, an institution of postsecondary education may not commence or continue to operate, do business, or function without a certificate of approval from the State Board for Higher Education.

(b) *Issuance.* — The State Board for Higher Education shall issue a certificate of approval to an institution of postsecondary education if it finds that the facilities, conditions of entrance and scholarship, and educational qualifications and standards are adequate and appropriate for:

(1) The purposes of the institution; and

(2) The programs, training, and courses to be offered by the institution.

(c) *Notice of deficiencies; hearing.* — (1) If the State Board for Higher Education believes that an institution of postsecondary education that applies for a certificate of approval does not meet the conditions or standards necessary for the issuance of the certificate, it shall give the institution written notice of the specific deficiencies.

(2) Within 20 days of receipt of a notice of deficiencies, the institution may request a hearing before the Board, and within 60 days of receipt of the request the Board shall hold a hearing to determine if the certificate of approval should be issued.

(3) If, within 6 months from the date on which the application for certification was submitted to the State Board for Higher

Education, the institution has received neither a certificate of approval under subsection (b) of this section nor written notice of deficiencies under this subsection, it may request within 20 days, a hearing before the Board to determine if the certificate of approval should be issued.

(d) *Judicial review.* — (1) Any institution of postsecondary education that is denied a certificate of approval by the Board after a hearing granted under subsection (c) of this section has the right to judicial review provided by the Administrative Procedure Act.

(2) The decision of the Board shall be presumed correct, and the institution has the burden of proving otherwise.

(3) The Board shall be a party to the proceeding. (An. Code 1957, art. 77A, § 32A; 1978, ch. 22, § 2; 1979, ch. 278.)

§ 12-204. Bonds of institutions; guaranty fund.

(a) *May be required.* — The State Board for Higher Education may require any institution that is required to obtain a certificate of approval to furnish a performance bond to this State conditioned that the institution will:

(1) Perform faithfully all agreements or contracts it makes with its students; and

(2) Comply with this article.

(b) *Form and content.* — Any bond required under this section shall be in the form and amount the Commissioner of Higher Education requires.

(c) *Liability of surety; payment.* — (1) The total liability of a surety on a bond under this section may not exceed the amount of the bond.

(2) If the total amount of claims filed against a bond exceeds the amount of the bond, the surety shall pay the amount of the

bond to the Commissioner of Higher Education for distribution by him to the claimants.

(d) *Guaranty fund for postsecondary, nondegree granting, proprietary institutions.* — (1) The State Board for Higher Education, by rule and regulation, may create and provide for the operation of a guaranty fund for postsecondary, nondegree granting, proprietary institutions of education.

(2) The fund shall be used to reimburse any student at a postsecondary, nondegree granting, proprietary institution of education who suffers a loss of tuition and fees because the institution has violated any provision of subsection (a) (1) or (2) of this section.

(3) (i) Each postsecondary, nondegree granting, proprietary institution that is required to obtain a certificate of approval shall pay an annual fee into the fund.

(ii) the State Board for Higher Education shall determine the amount of the fee based on the probable amount of money needed for the fund for each fiscal year. If the moneys in the guaranty fund are insufficient to satisfy duly authorized claims, the member institutions shall be reassessed and shall pay the additional amounts required.

(iii) The State Board for Higher Education may not issue a certificate of approval to an institution that fails to pay the annual fee and reassessment, if any.

(4) (i) The fund shall be maintained by the State Comptroller who may deposit or invest the assets of the fund in any manner consistent with the purposes of the fund.

(ii) All interest or other return on fund investment shall be credited to the fund.

(5) The State Board for Higher Education, through the Attorney General, may enforce any claim for restitution. (An. Code 1957, art. 77A, § 32; 1978, ch. 22, § 2; 1981, ch. 399.)

§ 12-205. Issuance of certificate.

An institution of postsecondary education may not issue any certificate, diploma, or degree without the approval of the State Board for Higher Education of the conditions of entrance, scholarship, and residence under which the certificate, diploma, or degree is issued. (An. Code 1957, art. 77A, § 32A; 1978, ch. 22, § 2.)

§ 12-206. Supervision by Board.

(a) *In general.* — If the State Board for Higher Education believes that an institution of postsecondary education does not meet the conditions or standards on which its certificate of approval was based, it shall give the institution written notice of its belief.

(b) *Contents of notice; hearing.* — (1) The notice shall specify the alleged deficiencies, and direct the institution to correct them within a period of not less than 30 days.

(2) If the institution requests a hearing within 20 days of the notice, the Board shall hold a hearing on the matter.

(3) The order to correct the deficiencies shall be stayed until a determination is made after the hearing.

(c) *Order to stop operating.* — (1) If the institution fails to correct the deficiencies within the period set by the Board, the Board may order the institution to stop operating, doing business, or functioning in this State if:

(i) A hearing is not requested; or

(ii) After the hearing, the Board determines that the institution does not meet the conditions or standards on which the certificate was issued.

(2) The order takes effect 15 days after it is issued.

(d) *Judicial review.* — (1) An institution that is aggrieved by an order of the Board has the right to judicial review provided by the Administrative Procedure Act.

(2) The decision of the Board shall be presumed correct and the institution has the burden of proving otherwise.

(3) The Board shall be a party to the proceeding. (An. Code 1957, art. 77A, § 32A; 1978, ch. 22, § 2.)

§ 12-207. Records of defunct institutions.

(a) *Records to be furnished.* — Before any institution of postsecondary education operating in this State discontinues operation, its chief administrative officer shall file with the State Board for Higher Education, the original or legible copies of all essential records of the academic achievements of all former students of the institution.

(b) *Form of records.* — The records shall present, as separate documents:

(1) The academic record of each former student; and

(2) Any other academic information usually required by institutions of postsecondary education when considering students for transfer or advanced study.

(c) *Board to maintain records.* — The Board shall maintain a permanent file of all records filed with it under this section. (An. Code 1957, art. 77A § 32A; 1978, ch. 22, § 2.)

CODE OF MARYLAND REGULATIONS

Chapter 09. Nonpublic Nursery Schools, Kindergartens, and Elementary, Middle, and Secondary Schools.

PERSONNEL **13A.09.09.05**

* * * * *

C. Teachers.

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(2) Teachers in schools adhering to the Montessori philosophy shall have a bachelor's degree from an accredited institution or an institution accepted by the State Department of Education and a Montessori diploma for their level of assignment from an accredited institution or an institution accepted by the State Department of Education.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
As amended Dec. 27, 1946, eff. March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

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Rule 72

MAGISTRATES: PRETRIAL MATTERS

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(b) Dispositive Motions and Prisoner Petitions. A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

Added Apr. 28, 1983, eff. Aug. 1, 1983.